Boston College Law Review

Volume 28
Issue 5 *Number 5*

Article 5

9-1-1987

Voluntary Public Employer Affirmative Action: Reconciling Title VII Consent Decrees With the Equal Protection Claims of Majority Employees

William T. Matlack

VOLUNTARY PUBLIC EMPLOYER AFFIRMATIVE ACTION: RECONCILING TITLE VII CONSENT DECREES WITH THE EQUAL PROTECTION CLAIMS OF MAJORITY EMPLOYEES

Title VII of the Civil Rights Act of 1964[1] has required many employers to negotiate structural changes in their hiring and promotion policies in order to redress racial and sexual discrimination.[2] When first enacted, Title VII prohibited racial, sexual, and religious discrimination only in private sector employment.[3] In 1972, however, Congress amended Title VII to include state and local employers as well.[4] Thus, since 1972 public sector employers have been subject to the separate and sometimes conflicting requirements of Title VII and the equal protection clause of the Constitution.

Compliance with Title VII often involves specific affirmative action plans[5] designed to remedy the effects of prior discrimination.[6] Such affirmative action plans are usually group oriented and created voluntarily between the minority plaintiffs and their employer pursuant to a Title VII consent decree.[7] The terms of the resulting consent decree also affect the employment rights and prerogatives of majority employees,[8] however —

---

[1] 42 U.S.C. §§ 2000e–2000e-17 (1982).

[2] Title VII makes it unlawful for an employer to discriminate in hiring, promotion, or other employment related practices on the basis of race, color, national origin, sex, or religion. 42 U.S.C. § 2000e-2(a) (1982).

[3] *See, e.g.*, 110 CONG. REC. 6,548 (1964). Senator Humphrey stated that "[t]he crux of the problem [was] to open employment opportunities for Negroes in occupations which had been traditionally closed to them." *Id.*

[4] *See* 42 U.S.C. 2000e(a), e-(b)(1) (1982). Where relevant to the constitutional inquiry, this note will distinguish between public and private employers. Otherwise, the Title VII analysis is the same for public or private employers.

[5] For the purposes of this note, the phrase "affirmative action plan" refers to workplace preferences based on race or other characteristics protected by Title VII granted to individuals not the adjudicated victims of unlawful discrimination. *See* J. LIVINGSTONE, FAIR GAME? INEQUALITY AND AFFIRMATIVE ACTION 11 (1979) ("affirmative action means preference on the basis of race or it [means] nothing"), *quoted in*, Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887, 892 n.31.

[6] Affirmative action plans often take the form of hiring and promotion quotas. *See, e.g.*, Bratton v. City of Detroit, 704 F.2d 878, 882 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984) (one black police officer promoted for every white police officer until 50% of police lieutenants are black).

[7] A consent decree is a settlement negotiated between the parties which is entered subsequently as a judgment of the court. *See* United States v. City of Miami, 664 F.2d 435, 439 (5th Cir. 1981) (en banc) (Rubin, J., concurring). When the court enters the decree it does not resolve or make any findings of facts on the merits of the dispute, *see id.* at 440 (Rubin, J., concurring), although it may make some limited inquiry into the propriety of the decree. *See* Note, *Collateral Attacks on Employment Discrimination Consent Decrees*, 53 U. CHI. L. REV. 147 (1986) [hereinafter Note, *Collateral Attacks*]. One commentator has noted that "between 1972 and 1983, the Justice Department sued and obtained relief under Title VII against 106 state and local government employers; of these cases 93 — 88% — were settled by consent decree." *See* Schwarzschild, *supra* note 5, at 894. Because consent decrees are flexible, relatively inexpensive, and involve no findings of fact, both minority plaintiffs and defendant employers often seek a consent decree as the vehicle for resolving Title VII claims.

[8] Throughout this note the term "minority employees" describes plaintiffs who are blacks, women, or others commonly referred to as minorities. Minority employees, with few exceptions,

particularly when the decree modifies existing seniority rights.[9] White employees may be denied promotions or other benefits, and white job applicants may be denied the employment they might have had absent the affirmative action plan.[10]

Majority employees affected by the consent decrees have, therefore, asserted that these plans constitute illegal racial discrimination against white employees.[11] Public and private employees who claim that they are illegally harmed by the affirmative action plan may attack the consent decree on the basis of their own Title VII rights to be free from employment discrimination.[12] Moreover, in the public sector, the rights of the majority employees arising under the equal protection clause of the Constitution may directly conflict with the operation of the voluntary affirmative action plans under Title VII.[13]

Delineating the precise balance between the use of affirmative action to remove often longstanding employment barriers against minorities, and the right of whites to be free from excessive reverse discrimination, has proven a formidable judicial challenge. The most difficult area in which to strike this balance is where white public employees claim that an affirmative action plan, implemented pursuant to a Title VII consent decree, violates the equal protection clause of the Constitution. Here courts must grapple with the two distinct statutory and constitutional doctrines — doctrines which developed independently and now collide. The task, then, is for the courts to reconcile their interpretation of the constitutional requirements of a valid affirmative action plan with the operation of the Title VII consent decree. If this reconciliation does not occur, the alternative is to declare the voluntary settlement embodied in the consent decree constitutionally unworkable, and to litigate every affirmative action plan.

Many courts have sought to avoid the issue, however, by precluding whites from judicial challenge to consent decree affirmative action plans. Majority employees have had difficulty either intervening in consent decree negotiations after they have begun, or subsequently attacking the decree as reverse racial discrimination prohibited by either Title VII or the equal protection clause of the Constitution.[14] Many courts have reasoned that the inclusion of majority employees in the negotiation process between minority employees and the employer would frustrate the Title VII goal of voluntary settlement.[15]

---

bring the original Title VII suit against their employer. "Majority employees" may make subsequent efforts to intervene or challenge the result of the consent decree entered in the original suit to preserve the employment rights affected by the decree. The term "majority employees" or "nonminority employees" will describe the white persons or nonminorities adversely affected by the affirmative action content of the decree.

[9] *See, e.g., City of Miami*, 664 F.2d at 438; EEOC v. American Tel. & Tel. Co., 556 F.2d 167, 173 (3d Cir. 1977).

[10] *See, e.g.*, United Steelworkers v. Weber, 443 U.S. 193 (1979) (white employee denied in-plant training program for skilled job); Bratton v. City of Detroit, 704 F.2d 878, 882 (6th Cir. 1983) (one-half promotions reserved for black police officers); Thaggard v. City of Jackson, 687 F.2d 66, 67 (5th Cir. 1982) (one-half of all job vacancies reserved for blacks, subject to availability of qualified applicants).

[11] *See* Local Number 93 v. City of Cleveland, 106 S. Ct. 3063 (1986).

[12] *See, e.g.*, United Steelworkers v. Weber, 443 U.S. 193 (1979).

[13] *See, e.g.*, Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842 (1986).

[14] *See, e.g.*, Thaggard v. City of Jackson, 687 F.2d 66 (5th Cir. 1982), *cert. denied sub nom.* Ashley v. City of Jackson, 464 U.S. 900 (1983). See *infra* notes 93–165 and accompanying text for a discussion of majority employees' efforts to intervene in or subsequently challenge affirmative action consent decrees.

[15] *See, e.g.*, Culbreath v. Dukakis, 630 F.2d 15, 22 (1st Cir. 1980) ("[T]he courts strongly favor

These courts often exclude majority employees because the employees failed to seek intervention at the outset of the negotiation process, and courts preclude later intervention as untimely.[16] Courts also dismiss independent suits against consent decree affirmative action plans as impermissible collateral attacks on the decree.[17] Consequently, many courts have denied majority employees a forum in which they can challenge the decree.

Other courts, however, have allowed majority employees to intervene and make their arguments against the affirmative action plan.[18] If the employees receive intervenor status, however, most courts do not then permit them to block the entry of the consent decree.[19] Only one court has refused to enter the consent decree because of the majority employees' objections. That court determined that the decree compromised the majority employees' contractual rights.[20]

Two recent United States Supreme Court decisions represent the Court's latest attempt to resolve the patchwork quality of lower court decisions in majority challenges to voluntary affirmative action plans. In *Local Number 93 v. City of Cleveland*, the Supreme Court noted with approval the district court's insistence that the the union representing the majority employees intervene early in the formation of a consent decree.[21] The union was able to participate in the negotiations, but was not permitted to block the ensuing decree.[22] The Supreme Court affirmed the consent decree over the union's objections, holding that because a consent decree is not the equivalent of a court order under Title VII, the Title VII requirement that a court make a judicial finding of discrimination before it may order an affirmative action plan does not apply.[23] Rather, the Court found that consent decrees are to be treated as voluntary settlements for the purposes of Title VII, and consequently that no finding of past discrimination is necessary.[24]

---

resolution of suits such as this one by voluntary agreement, and there is a distinct probability that the intervention of the unions will destroy the consent decree and force a trial on the merits.").

[16] *E.g*, *Thaggard*, 687 F.2d at 689. See *infra* notes 104–115 and accompanying text for a discussion of the *Thaggard* decision.

[17] *Id.*

[18] See *Local Number 93*, 106 S. Ct. 3063; see *infra* notes 116–127 and accompanying text for a discussion of cases that permitted intervention by majority employees.

[19] See *Local Number 93*, 106 S. Ct. 3063; see *infra* notes 116–121 and accompanying text for discussion of intervenor's limited rights.

[20] *City of Miami*, 664 F.2d at 442. In *City of Miami*, the court noted that "[p]arts of the decree do affect the third party who did not consent to it, and these parts cannot properly be included in a valid consent decree." *Id.*

[21] 106 S. Ct. 3063 (1986).

[22] *Id.* at 3066–71.

[23] *Id.* at 3071–72.

[24] *Id.* at 3071–73. The union's argument was based upon Firefighters Local 1784 v. Stotts, 467 U.S. 561 (1984), where the Court held that a court could not order affirmative action absent an adjudicated finding of discrimination. In *Stotts*, the district court had entered a Title VII consent decree containing an affirmative action plan for promotion and hiring of minorities. Subsequently, when layoffs became necessary, the court modified the consent decree to protect minority employees with low seniority from being laid off. The Supreme Court in *Stotts* relied upon section 706(g) of Title VII, codified as 42 U.S.C. §§ 2000e–20005(g) (1982), which provides that "no order of the court" concerning employment rights may be made for any reason other than discrimination, to strike down the modification of the consent decree.

The Supreme Court distinguished *Local Number 93* from *Stotts* in that *Local Number 93* involved the entry of a consent decree negotiated by the parties, and not the court's order of the modification of the terms of the consent decree at issue in *Stotts*. *Local Number 93*, 106 S. Ct. at 3072–73.

The Supreme Court ruled the union's pleadings failed to raise the reverse discrimination claims that the affirmative action plan violated the majority employees' equal protection or substantive Title VII rights.[25] The Court left these issues to be raised before the district court which maintained jurisdiction over the implementation of the consent decree.[26] Thus, although the Supreme Court implicitly approved the lower court's finding that the majority employees had standing to challenge the consent decree, the Court did not resolve the precise nature of their involvement in Title VII consent decrees.[27]

In contrast to the Title VII consent decree at issue in *Local Number 93*, *Wygant v. Jackson Board of Education* involved an equal protection challenge to an affirmative action plan negotiated in a collective bargaining agreement between school teachers and a municipality.[28] The Court struck the affirmative action provision of the collective bargaining agreement, concluding that the plan violated the equal protection rights of white teachers who were laid off before minority teachers with less seniority.[29] Although a plurality of the Court found the plan unconstitutional, in dicta the Court suggested the constitutional requirements necessary to establish a valid affirmative action plan.[30] Among these requirements the Court emphasized the need for "particularized findings of past discrimination" by the public employer.[31] Justice O'Connor pointed out in concurrence, however, that if the requirement that public employers document their own racial discrimination is applied restrictively, it might "severely undermine" the goal of voluntary compliance with Title VII.[32] Thus, although at least one Justice acknowledged the tension between equal protection standards and Title VII standards, lower courts were left with no indication of how to reconcile the two in challenges to affirmative action plans.

Because affected majority employees have the due process right to claim that affirmative action plans violate their constitutional and Title VII rights, courts should not resort to technical procedural barriers to protect consent decrees. Courts either should permit them to intervene in the consent decree negotiation, or allow them to press their claims in separate suits. Yet, granting traditional full party status to majority employees might block the settlement of Title VII claims and force the trial on the merits that Congress, the courts, and the other parties wished to avoid. Further, a separate suit by majority employees on the issues of reverse discrimination also would frustrate the goals of Title VII by promoting litigation rather than private settlement.[33]

Thus, there are two levels of unresolved questions in the debate over public employer consent decree affirmative action plans: first, how to include majority employees in the consent decree process without destroying the voluntary, flexible and nonlitigious nature of the decree; and second, when the reverse discrimination claims of majority employees are addressed, how to reconcile the lack of findings of fact in the Title VII consent

---

[25] *Local Number 93*, 106 S. Ct. at 3073 n.8, 3080.
[26] *Id.* at 3073 n.8.
[27] *Id.*
[28] 106 S. Ct. 1842 (1986).
[29] *Id.* at 1852.
[30] *Id.* at 1848–49.
[31] *Id.* at 1848.
[32] *Id.* at 1855 (O'Connor, J., concurring).
[33] *See City of Miami*, 664 F.2d at 440.

decree with the equal protection prohibition against affirmative action without a strong evidentiary basis of past discrimination.

The resolution of these questions requires an expansion of the consent decree process, and a less restrictive interpretation of the equal protection clause. Courts should include majority employees on a limited basis, such that their claims can be heard and addressed, without the need for full litigation. Specifically, courts should include majority employees in a fairness hearing where they may raise objections and move for modifications but not block the settlement. And for such limited involvement to function, courts must interpret the equal protection clause to permit affirmative action plans adopted in this fashion, rather than requiring full adjudication of the employer's prior discrimination.[34]

This note will examine the procedural rights of majority employees to intervene in voluntary affirmative action consent decree negotiations, and the ways in which courts have resolved their substantive claims of reverse discrimination under both Title VII and the equal protection clause of the Constitution. Section I will examine the use of consent decrees under Title VII to effectuate the broad remedial purpose of the statute.[35] Section II will explore the independent requirements of a valid affirmative action plan under the equal protection clause.[36] Section III will discuss how courts have responded when majority employees have claimed that affirmative action plans violate both Title VII and the equal protection clause.[37] Finally, Section IV will offer a proposal for reconciling the purposes of Title VII and the Constitution in voluntary affirmative action through a formalized procedure of limited majority employee inclusion in the consent decree negotiations.[38] The note will conclude that the future efficacy of consent decree affirmative action plans lies not in excluding whites from asserting that the plans are unwarranted and illegal, but in interpreting the Constitution so that the rights of white employees do not allow them to scuttle the voluntary efforts of public employers to break down historical patterns of discrimination.

I. Consent Decrees under Title VII

Congress enacted Title VII of the Civil Rights Act of 1964 in order to address pervasive discrimination in the American workplace.[39] The statute prohibits employers from making hiring, promotion, or any other personnel decision on the basis of race, color, religion, sex, or national origin.[40] As interpreted by the Supreme Court, the

---

[34] One commentator has advocated such an approach. *See* Schwarzschild, *supra* note 5, at 887. Professor Schwarzschild has proposed a fairness hearing during the consent decree process to address the Title VII claims of majority employees. A similar procedure can also accommodate majority employee claims that a Title VII affirmative action plan violates the equal protection clause. *See infra* notes 328–50 and accompanying text.

[35] *See infra* notes 39–165 and accompanying text.

[36] *See infra* notes 166–232 and accompanying text.

[37] *See infra* notes 233–88 and accompanying text.

[38] *See infra* notes 289–352 and accompanying text.

[39] 110 Cong. Rec. 7,220 (1964). Senator Clark told the Senate "[t]he rate of Negro unemployment has gone up consistently as compared with white unemployment for the past 15 years. This is a social malaise and a social situation which we should not tolerate." *Id.*, *quoted in* United Steelworkers v. Weber, 443 U.S. 193, 202–03 (1978).

[40] 42 U.S.C. § 2000e-2(a) (1982). The statute provides in relevant part:

It shall be an unlawful employment practice for an employer —

primary goal of the statute is "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[41]

While the overriding purpose of the statute is clear, Congress stated its prohibitions in general terms. For example, the statutory language does not provide a definition of discrimination, nor does it offer evidentiary guidelines in determining the burdens and degrees of proof required to prove discrimination.[42] In addition, although Congress specifically provided that courts may order the reinstatement or hiring of employees, with or without backpay, Congress also authorized courts to provide any other equitable relief they deem appropriate.[43] By necessity, therefore, in the enforcement of Title VII courts have been charged with the responsibility of developing evidentiary standards for proving prohibited discrimination, and formulating remedies which may restructure the way in which an employer hires, trains, promotes, assigns, and fires its staff.[44]

Although courts have broad powers to fashion remedies under Title VII, Congress specifically intended voluntary settlement to be the primary vehicle for enforcing Title VII.[45] The procedural requirements of Title VII and the role established for the Equal Employment Opportunity Commission (EEOC) were designed to promote voluntary

---

> (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.

[41] Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971).

[42] For example, 42 U.S.C. §2000e-5(b) (1982) states only that the Equal Employment Opportunity Commission (EEOC) shall investigate charges of discrimination and determine if "there is a reasonable cause to believe that the charge is true." *See also* 42 U.S.C. § 2000e-1 (1982) (definitions do not include a definition of "discrimination").

[43] 42 U.S.C. § 2000e-5(g) (1982).

[44] *See* Schwarzschild, *supra* note 5, at 890–91. One reason for judicial "activism" in the Title VII area is the public law or "structural" nature of the Title VII suit. The very nature of Title VII requires a great deal of judicial discretion and creativity in finding specific expression for the values manifest in the Congressional mandate. *Id.* Such a court order affects not only the often large institutional employer and the plaintiff class party to the suit, but classes of incumbent and future employees as well. *Id.*

Professor Schwarzschild has argued that Title VII litigation is paradigmatic of large scale "public law" or structural litigation because courts issue sweeping remedial injunctions that fundamentally reshape the personnel policies of employers. *Id.* at 887 (citing Fiss, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979)). These changes are not designed to correct the employer's specific violations but to "create a new climate for employment decisions in the future." *Id.* at 892. As such, Title VII remedies are only loosely related to the violations cited in the suit. Schwarzschild argues that broad prospective remedies are a matter of judicial discretion. Unlike a traditional civil remedy which "makes whole" specific victims, "no particular policy choice for the future follows automatically from the employer's past violation of Title VII." *Id.* at 893.

[45] 42 U.S.C. § 2000e-5(b) (1982). The statute states, "[t]he Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion . . . ." *Id.*

settlement.[46] To initiate a Title VII suit, a plaintiff must file a timely charge with the EEOC.[47] The EEOC then investigates the claim, and if it determines that there is a reasonable cause to believe that the charge is true, the statute requires the EEOC to engage the employer in serious negotiations in the expectation of eliminating the violation through voluntary action.[48]

Only after such efforts have failed may the EEOC bring a civil action against the employer.[49] The party who originally alleged the unlawful discrimination then may intervene in that action.[50] Thus, Congress intended the EEOC to function primarily as a mediator in the enforcement of Title VII. Only where determined efforts to forge a voluntary settlement have failed may the government, or the alleged victims, pursue litigation. Moreover, the Supreme Court has stressed that court-ordered remedies, particularly the award of backpay to victims, merely ensure the "prophylactic" aspect of the goal of voluntary compliance.[51] The Supreme Court reasoned that if employers were made cognizant of potential liability for monetary damages to the victims of discrimination, they would find it to their advantage to eliminate their discrimination voluntarily.[52]

When employers seek to remedy prior discrimination independently, they often include an affirmative action plan in the collective bargaining agreement with their employees.[53] These affirmative action provisions are negotiated by the parties to the agreement, independent of any court involvement.[54] When employers do not voluntarily correct prohibited discrimination, however, employees or job applicants may find it necessary to file a formal charge of unlawful discrimination with the EEOC.[55] The EEOC negotiations with the employer are often successful, and the terms of the resulting settlement are usually formalized through incorporation into a consent decree.[56] Unlike a collective bargaining agreement, a federal judge examines a proposed settlement and decides whether to enter it as the decree of the court.[57] Once entered, the court maintains

---

[46] *See* United Steelworkers v. Weber, 443 U.S. 193, 204 (1979); Johnson v. Seaboard Air Line R.R., 405 F.2d 645, 651 nn.12–15 (4th Cir. 1968).

[47] 42 U.S.C. § 2000e-5(e).

[48] 42 U.S.C. § 2000e-5(b).

[49] 42 U.S.C. § 2000e-5(f)(1). The Commission has 180 days to reach a conciliation agreement, and then may file a charge in court and move for an additional 60 days for "further efforts of the Commission to obtain voluntary compliance." *Id.* If the EEOC determines that a claim against a public employer has merit and fails to negotiate a settlement during this period, it transfers the claim to the Attorney General. *Id.*

[50] *Id.* If the Commission finds that the claim is meritless, however, the aggrieved party may initiate a private suit on her own behalf as soon as she is so notified.

[51] Albermarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975).

[52] *Id.* at 417–18. In *Albermarle*, the Court noted that:

> It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, [by voluntary action] so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."

Id. (quoting United States v. N.L. Indus. Inc., 479 F.2d 354, 379 (8th Cir. 1973)).

[53] *See, e.g., Weber*, 443 U.S. at 198.

[54] *Id.*

[55] *See, e.g.*, Griggs v. Duke Power, 401 U.S. 424 (1971).

[56] *See* Schwarzschild, *supra* note 5, at 894.

[57] *Id.*

jurisdiction during the consent decree's implementation.[58] This jurisdiction includes the power to interpret the proper implementation of the decree under changing circumstances, and to modify its terms altogether to preserve its central purpose.[59]

Although consent decrees are widely used, courts do not agree on the consent decree's precise effect on future litigation among the employer, the minority group, and the affected majority employees.[60] While consent decrees are founded on the agreement of the parties, they are judgments in the sense that a court must approve them and a court may enforce the decree through judicial sanctions, including citation for contempt if the terms are violated.[61] In some cases decrees may have the force of res judicata and protect the parties from future litigation.[62] In contrast, some courts have reasoned that because the parties assent to its significant provisions, consent decrees are similar to contracts and may be enforced in the same manner.[63] Thus, courts have found that consent decrees contain qualities of both private contractual settlements and coercive judicial orders.

The consent decree, however, is not a decision of the court on the merits; the court makes no finding of fact in the usual sense.[64] Yet the court does have some duty to inquire into the propriety of the proposed decree.[65] The standards by which courts examine proposed decrees have varied widely, however. Some courts "rubber stamp" the proposal, particularly when the federal government is the negotiating party.[66] Other courts focus on the fairness of the settlement, as in any proposed class action settlement, and hold hearings to consider objections from class members.[67] Some courts also inquire carefully into the proposed decree and hear the positions of various interested groups.[68]

---

[58] *See, e.g., Local Number 93 v. City of Cleveland*, 106 S. Ct. at 3080.

[59] *See* Stotts v. Memphis Fire Dep't, 679 F.2d 541, 553 (6th Cir. 1982), *rev'd on other grounds sub nom.*, Firefighters Local 1784 v. Stotts, 467 U.S. 561 (1984).

[60] *See*, Schwarzschild, *supra* note 5, at 894–97.

[61] United States v. City of Miami, 664 F.2d 435, 439–40 (5th Cir. 1981); *see* 1B J. MOORE, J. LUCAS & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.409[5] (2d ed. 1984); James, *Consent Judgments as Collateral Estoppel*, 108 U. PA. L. REV. 173 (1959).

[62] *See* James, *supra* note 61.

[63] *E.g., City of Miami*, 664 F.2d at 440.

[64] *Id.* The court noted that the consent decree:

> is not the equivalent to a judicial decision on the merits. It is not the result of a judicial determination after the annealment of the adversary process and a judge's reflection about the ultimate merits of conflicting claims .... Forged by the parties as a compromise between their views, it embodies primarily the results of negotiation rather than adjudication.

Id.

[65] *See* Schwarzschild, *supra* note 5, at 913.

[66] In this situation courts have entered the decree the same day the complaint was filed. *E.g.*, United States v. Allegheny-Ludlum Indus., 517 F.2d 826, 850 (5th Cir. 1975). The Court stated, "nor should we substitute our notions of fairness ... for those of the parties ... absent a strong showing ...." *Id.*

[67] The Federal Rules of Civil Procedure require court approval of class action settlements and require that class members receive notice of the proposed settlement. FED. R. CIV. P. 23(e). Courts may hold "fairness hearings" to consider objections to the decree by members of the plaintiff class. Some courts have allowed nonminority employees to participate in such hearings. *See* Dennison v. City of Los Angeles Dep't of Water and Power, 658 F.2d 694, 695 (9th Cir. 1981); Schwarzschild, *supra* note 5, at 915.

[68] In *City of Miami*, 664 F.2d at 441–42 (Rubin, J., concurring), the plurality asserted:

> Because the consent decree does not merely validate a compromise but, by virtue of its injunctive provisions, reaches into the future and has continuing effect ... the

Employers often enter consent decree negotiations because minority plaintiffs or the government identify a statistical imbalance in the workforce sufficient to establish a prima facie case of Title VII discrimination.[69] Consent decrees under Title VII usually require the employer not only to cease any current discriminatory practices, but also to correct the statistical imbalance resulting from past discrimination.[70] To eliminate the imbalance employers often adopt quotas to hire and promote minorities until the imbalance is removed.[71] Because this type of affirmative action also affects the employment opportunities of majority workers, however, these workers may challenge the plan itself as discriminatory under Title VII.

The Supreme Court first upheld the use of voluntary affirmative action quotas in the 1979 landmark case of *United Steelworkers v. Weber*.[72] In *Weber*, a white employee challenged on Title VII grounds a collective bargaining agreement which reserved 50% of the openings in an in-plant craft training program for black employees.[73] The agreement specified that the affirmative action quota would reserve these openings until the percentage of black craft workers was commensurate with that of the local labor force.[74] At the time the affirmative action plan was implemented in 1974, 1.83% of the skilled craftworkers in the plant were black while the local workforce was approximately 39% black.[75]

The Court held that sections 703(a) and (d) of Title VII,[76] which prohibit racial discrimination in employment, do not condemn all private, voluntary, race conscious affirmative action plans.[77] The Court read the statutory language of section 703(j)[78] to

---

> court should . . . examine it carefully to ascertain not only that it is a fair settlement but also that it does not put the court's sanction on and power behind a decree that violates Constitution, statute, or jurisprudence.

Id. at 441 (Rubin, J., concurring).

[69] *See* Schwarzschild, *supra* note 5, at 899–900 (under Title VII statistics of disproportionate minority representation in the workforce as compared to the relevant labor market are difficult to rebut).

[70] *Id.* at 894–98 (listing elements of typical consent decree).

[71] *See, e.g., Weber*, 443 U.S. at 198 (collective bargaining agreement included plan to reserve 50% of openings in craft training program for black employees); Thaggard v. Jackson, 687 F.2d 66 (5th Cir. 1982) (affirmed consent decree with separate promotion and hiring lists for blacks and whites to be used on one-to-one ratio until proportion equaled proportion of the city's population), *cert. denied*, 464 U.S. 900 (1983); Dennison v. City of Los Angeles Dep't of Water and Power, 658 F.2d 694 (9th Cir. 1981) (affirmed consent decree providing 50% of all initial hiring and promotions awarded to qualified minority applicants until list of identifiable past applicants depleted); Baker v. City of Detroit, 483 F. Supp. 919 (E.D. Mich. 1979) (police department adopted affirmative action program requiring separate black and white promotion lists with one-to-one ratio until ratio in all three job levels were 50/50 and commensurate with population), *aff'd sub nom.* Bratton v. City of Detroit, 704 F.2d 878 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

[72] 443 U.S. 193, 204–06 (1979).

[73] *Id.* at 199.

[74] *Id.*

[75] *Id.* at 198–99.

[76] Title VII's sections 703(a) and (d), codified at 42 U.S.C. §§ 2000e-2(a), and (d), respectively, provide that it is unlawful for an employer or a labor organization to discriminate in employment practices on the basis of race, color, religion, sex, or national origin.

[77] United Steelworkers v. Weber, 443 U.S. 193, 208 (1979).

[78] Section 703(j) provides that "nothing in this title":

> shall be interpreted to require any employer
> . . . [or] labor organization to grant preferential treatment to any individual or
> . . . group because of race, color, religion, sex, or national origin of such individual or

mean that Title VII cannot "require" any employer to grant preferential racial treatment because of a racial imbalance in the work force, but section 703(j) does "permit" voluntary affirmative action under Title VII to correct racial imbalances.[79] The Court found *Weber's* voluntary affirmative action plan within the permissible area of discretion left by Title VII to the private employer.[80]

Expanding on the statutory analysis, Justice Blackmun, concurring, stressed the need for a zone of discretion for employers to implement voluntary plans to comply with Title VII.[81] He stated that if Title VII is read literally, employers are placed on a "high tightrope without a net beneath them"[82] because they face liability for past discrimination against minorities, and also liability to white employees for racial preferences adopted to mitigate the effects of prior discrimination.[83] Justice Blackmun's proposed solution to this problem was to uphold voluntary affirmative action plans if the plans are "a reasonable response to an 'arguable violation' of Title VII."[84]

The Court declined to "define in detail the line of demarcation between permissible and impermissible affirmative action plans."[85] Nonetheless, the Court outlined several important factors in the analysis of a valid voluntary affirmative action plan. First, the Court stated, the purpose of the plan must mirror that of the statute by breaking down traditional patterns of racial segregation and hierarchy.[86] The Court cautioned, however, that such plans must be limited in their operation.[87] The plan should not "unnecessarily trammel the interests of white employees," nor should it "create an absolute bar to the advancement of white employees."[88] Finally, the Court concluded, a valid plan should operate as a temporary measure designed not to maintain racial balance, but to eliminate a manifest racial imbalance.[89]

In *Weber* the Supreme Court clarified the standard of review for direct attacks upon remedial racial preferences included in collective bargaining agreements. When the affirmative action is embodied in Title VII consent decrees, however, courts have taken a variety of approaches in determining the affected majority employee's right to challenge consent decrees. Some courts have precluded such challenges on various procedural grounds,[90] with one court openly concluding that consent decrees will not work if

---

> group on account of an imbalance which may exist with respect to the total number or percentages of persons of any race, color, religion, sex, or national origin . . . .

Id. 42 U.S.C. § 2000e-2(j) (1982).

[79] *Weber*, 443 U.S. at 205–06. Majority employees in *Weber* argued that this provision prohibits all racial preferences for those not found the actual victims of discrimination. *Id.*

[80] *Id.* at 209.

[81] *Id.* at 211 (Blackmun, J., concurring).

[82] *Id.* at 210 (Blackmun, J., concurring) (quoting Weber v. Kaiser Alum. & Chem. Corp., 563 F.2d 216, 230 (5th Cir. 1977) (Wisdom, J., dissenting)).

[83] *Id.* at 210 (Blackmun, J., concurring).

[84] *Id.* at 211 (Blackmun, J., concurring).

[85] *Id.* at 208.

[86] *See id.*

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] Thaggard v. City of Jackson, 687 F.2d 66, 67–68 (5th Cir. 1982) (majority employees not permitted to intervene in original suit, subsequent collateral suit dismissed), *cert. denied sub nom.* Ashley v. City of Jackson, 464 U.S. 900 (1983); Dennison v. City of Los Angeles Dep't of Water & Power, 658 F.2d 694, 696 (9th Cir. 1981) (consent decree not subject to collateral attack); O'Burn v. Shapp, 70 F.R.D. 549, 550 (E.D. Pa. 1976) (right to collaterally relitigate merits of decree denied

majority challenges are permitted.[91] Other courts have permitted limited and even full intervenor status to objecting majority employees.[92]

The courts which have precluded majority employee challenges to consent decrees have held both that majority employees could not intervene after the consent decree had been negotiated, nor could these employees challenge the content of those decrees in separate suits. In the 1976 case of *O'Burn v. Shapp*, the District Court for the Eastern District of Pennsylvania held that the majority employees could not collaterally attack a consent decree.[93] In *O'Burn*, the challengers to the decree argued *inter alia* that they should have standing to press their claims because they had not had "a meaningful hearing."[94] The court found that the majority employees still had the opportunity to seek intervention in the ongoing jurisdiction of the district court which had entered the decree.[95] Thus, the court reasoned, the separate suit constituted an impermissible collateral attack upon the prior consent decree.[96] Further, the court noted that to allow third persons an unqualified right to collaterally relitigate the merits of a judgment in a prior suit would make it impossible for a court to enter a final judgment.[97] The court also stated that to allow the collateral suit might expose the parties to the consent decree to inconsistent or contradictory proceedings.[98]

Unlike the challengers in *O'Burn*, the plaintiffs in *Prate v. Freedman* attempted to intervene before the court that had retained jurisdiction over the implementation of the consent decree.[99] Because the plaintiffs did not attempt to intervene until more than a year after the entry of the decree, however, the district court ruled that their action was

---

since party could attempt intervention in original suit) *aff'd mem.*, 546 F.2d 418 (3d Cir. 1976), *cert. denied*, 430 U.S. 968 (1977); Prate v. Freedman, 430 F. Supp. 1373, 1375 (W.D.N.Y. 1977) (intervention in original court one year after entry of decree denied as untimely; separate suit dismissed) *aff'd mem.*, 573 F.2d 1295 (2d Cir. 1977), *cert. denied*, 436 U.S. 922 (1978). In all of these cases minority employees filed claims for wrongful discrimination under Title VII, the minority employees and the employer negotiated an agreement including an affirmative action quota, and the settlement was entered as a consent decree. Subsequently, majority employees affected by the affirmative action who were not party to the original suit filed separate actions alleging that the employer, by fulfilling the requirements of the consent decree, violated Title VII and the Constitution by engaging in reverse discrimination. These suits sought to stop the operation of the consent decree through injunctive relief, money damages, or both. See Note, *Collateral Attacks*, *supra* note 7, at 147, 148–49 for an analysis of these cases.

[91] Culbreath v. Dukakis, 630 F.2d 15, 22 (1st Cir. 1980) (court denied unions' motion to intervene, reasoning that "there is a distinct probability that the intervention of the unions will destroy the consent decree and force a trial on the merits").

[92] *See* Vanguards v. City of Cleveland, 753 F.2d 479, 482 (6th Cir. 1985) (district court held "an evidentiary hearing to consider the [intervenor's] objections") *aff'd*, Local Number 93 v. City of Cleveland, 106 S. Ct. 3063 (1986); Kirkland v. New York State Dep't of Correctional Servs., 711 F.2d 1117, 1124 (2d Cir. 1983) (district court held hearings to consider intervenor's objections); *City of Miami*, 664 F.2d at 442 (Rubin, J., concurring) (intervenors permitted to block part of a consent decree).

[93] O'Burn v. Shapp, 70 F.R.D. 549, 553 (E.D. Pa. 1976), *aff'd mem.*, 546 F.2d 418 (3d Cir. 1976), *cert. denied*, 430 U.S. 968 (1977).

[94] *O'Burn*, 70 F.R.D. at 552.

[95] *Id.*

[96] *Id.* at 553.

[97] *Id.* at 552.

[98] *Id.*

[99] Prate v. Freedman, 430 F. Supp. 1373, 1375 (W.D.N.Y. 1977), *aff'd mem.*, 573 F.2d 1295 (2d Cir. 1977), *cert. denied*, 436 U.S. 922 (1978).

untimely.[100] The majority applicants then sought injunctive relief in a separate suit.[101] The district court hearing the independent complaint held that the plaintiffs should have sought timely intervention in the original case, and determined that the subsequent action constituted an impermissible collateral attack.[102] The court also emphasized that to permit further challenge to the consent decree would violate Title VII's policy to promote settlement by rendering the concept of final judgments meaningless.[103]

Similarly, in *Thaggard v. City of Jackson*, the Fifth Circuit ruled that the majority employees had failed to seek timely intervention in the original suit, and could not bring a collateral action.[104] The court followed the "settled" rule that a consent decree is not subject to collateral attack.[105] In addition, the court relied on the reasoning of *Prate* that courts must preserve Title VII's emphasis on voluntary settlement.[106]

On appeal to the Supreme Court, *Thaggard* was denied certiorari.[107] In dissent Justice Rehnquist, joined by Justice Brennan, challenged the reasoning of *Thaggard* and similar cases on due process and res judicata grounds.[108] Justice Rehnquist argued that he was "at a loss" to understand how the lower courts could preclude a suit brought by parties who had no connection with the prior litigation.[109] Justice Rehnquist pointed out that the affirmative action plan was not implemented until a year after the court entered the consent decree.[110] The plaintiffs attempted to intervene three years after the court entered the decree, he continued, but their motions were denied as untimely.[111] Justice Rehnquist argued that this violated a fundamental premise of preclusion law that non-parties to a prior action are not bound by the judgment.[112] Rather, Justice Rehnquist

---

[100] *Prate*, 430 F. Supp. at 1374.

[101] *Id.*

[102] *Id.* at 1375.

[103] *Id.* In another challenge to a consent decree, the majority employees attempted to distinguish their claim by seeking compensatory rather than injunctive relief under Title VII. In Dennison v. City of Los Angeles Dep't of Water & Power, 658 F.2d 694 (9th Cir. 1981), the Ninth Circuit rejected the plaintiffs' claim, holding that the plaintiffs could have timely intervened in the original suit prior to the formation and entry of the decree, and that to subsequently attack the decree would expose the employer to inconsistent obligations. *Id.* at 695.

Unlike most of the cases involving collateral attacks, the district court in *Dennison* permitted the majority employee union to participate in "fairness hearings" before entering the decree. The district court, and the Ninth Circuit on appeal, found that the fairness hearings held immediately before the entry of the decree adequately afforded the union an opportunity to present to the court its view of the adverse impact of the decree on the majority employees. *Id.* at 696. The court also noted that permitting the collateral suit would be inimical to the policy underlying Title VII of promoting settlements. *Id.*

[104] Thaggard v. City of Jackson, 687 F.2d 66 (5th Cir. 1982), *cert. denied, sub nom.* Ashley v. City of Jackson, 464 U.S. 900, 902 (1983).

[105] *Id.* at 68.

[106] *See id.*

[107] Ashley v. City of Jackson, 464 U.S. 900, 902 (1983) (Rehnquist, J., dissenting from denial of certiorari).

[108] *Ashley*, 464 at 901–02 (Rehnquist, J., dissenting from denial of certiorari). One commentator argues that in cases such as *Thaggard*, the parties in question may not have received timely notice as required by the due process clause of the Constitution and as interpreted in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). *See* Note, *Collateral Attacks*, *supra* note 7, at 154–65.

[109] *Ashley*, 464 U.S. at 901–02 (Rehnquist, J., dissenting from denial of certiorari).

[110] *Id.* at 902 (Rehnquist, J., dissenting from denial of certiorari).

[111] *Id.* (Rehnquist, J., dissenting from denial of certiorari).

[112] *Id.* (Rehnquist, J., dissenting from denial of certiorari). Justice Rehnquist noted that "[s]uch

argued, "everyone should have their own day in court."[113] This principle, the Justice continued, should apply with "all the more force" to a consent decree because it is not an adjudication on the merits, but rather little more than a contract between the parties formalized by a judge.[114] Justice Rehnquist concluded, therefore, that nonparties have an independent right to an adjudication of their claim that a defendant's conduct, whether pursuant to a consent decree or not, is unlawful.[115]

In contrast to courts which have precluded claims of reverse discrimination by majority employees, several courts have allowed at least some intervention by third parties, particularly where it appears that the consent decree may compromise their contractual rights.[116] For example, in *Kirkland v. New York State Department of Correctional Services*, nonminority employees were granted limited intervention "solely for the purpose of objecting to the proposed settlement."[117] The *Kirkland* court refused to permit the intervenors to litigate the merits of the underlying discrimination claims against the employer.[118] The employees were permitted to object only to provisions in the consent decree that they claimed altered their contractual seniority rights.[119] The court concluded, however, that no contractual rights were violated because the court determined that nonminorities did not have a legally protected interest in the mere expectation of

---

a decree binds the signatories, but cannot be used as a shield against all future suits by nonparties seeking to challenge conduct that may or may not be governed by the decree." *Id.* (Rehnquist, J., dissenting from denial of certiorari).

[113] *Id.* (Rehnquist, J., dissenting from denial of certiorari).

[114] *Id.* (Rehnquist, J., dissenting from denial of certiorari).

[115] Some lower courts have supported the due process and res judicata principles articulated by Justice Rehnquist. In United States v. Jefferson County, 720 F.2d 1511, 1517–19, 1519 n.20 (11th Cir. 1983), the Eleventh Circuit followed Justice Rehnquist's *Ashley* dissent on the issue of whether majority employees could bring a subsequent suit. The court noted that res judicata "prevent[s] the attack of a prior judgment by parties to the proceedings . . . . A final judgment may not, however, bind a nonparty when his interests were not represented." *Id* at 1517–18.

Furthermore, in Corley v. Jackson Police Dep't, 755 F.2d 1207, 1210 (5th Cir. 1985), a Fifth Circuit panel affirmed *Thaggard* in a related claim, but expressed some doubt about the principle. The panel stated:

> If the well-settled intervention rules in combination with the rule of *Thaggard v. City of Jackson*, to which we are firmly bound here, unjustly deny a party his day in court, then the appropriate remedy lies in reexamination of the *Thaggard* doctrine in the appropriate forum, particularly in light of the persuasive opinion of Justice Rehnquist . . . .

Id. at 1210, *quoted in*, Note, *Collateral Attacks*, *supra* note 7, at 151 n.22.

[116] *See, e.g.*, Youngblood v. Dalzell, 804 F.2d 360 (6th Cir. 1986) (majority employees were allowed to intervene only to challenge the affect of the consent decree on their promotions but not on the merits of the dispute); Howard v. McLucas, 782 F.2d 956, 960–61 (11th Cir. 1986) (same); EEOC v. American Tel. & Tel. Co., 556 F.2d 167, 173 (3d Cir. 1977) (employee union was permitted to intervene as the representative of majority employees because the decree could affect their contractual rights but the union was granted standing solely to assert a "claimed inconsistency between the decree and the promotional seniority provisions of their contracts").

In her concurrence in *Firefighters Local 1784 v. Stotts*, 467 U.S. 561 (1984), Justice O'Connor explicitly supported the view that intervention is required, at least if contractual benefits are at issue. Justice O'Connor concluded that "if innocent employees are to be required to make any [contractual] sacrifices in the final consent decree, they must be represented and have had full participation rights in the negotiation process." *Id.* at 588 (1984) (O'Connor, J., concurring).

[117] 711 F.2d 1117, 1125 (2d Cir. 1983).

[118] *Id.*

[119] *Id.* at 1121, 1125.

appointments, particularly when that expectation was based on the operation of "presumptively discriminatory employment practices."[120] Consequently, the *Kirkland* court entered the consent decree over the majority employees' objections.[121]

In contrast, a plurality of the Fifth Circuit found in *United States v. City of Miami* that the union's contractual expectations had been violated and therefore permitted the union to block the entry of some of the affirmative action provisions of the consent decree.[122] In *City of Miami*, because the collective bargaining agent for the police officers union was joined as a co-defendant with the city in the original action by the Attorney General, there was no subsequent dispute over intervention.[123] Thereafter, the city and the Attorney General reached a settlement that included explicit affirmative action promotion quotas, and the district court entered the settlement as a consent decree.[124]

In concurrence, one *City of Miami* judge noted that because the quota potentially violated the police officers' collective bargaining agreement, that element of the decree could not be entered without their consent.[125] The concurring judge characterized the three-party consent decree as a "hybrid decree," representing an agreement between two of the three parties.[126] The judge reasoned that insofar as the decree did not affect the nonconsenting party it was valid, but because some parts did affect the third party's contractual rights, these parts could not be included in a valid consent decree.[127]

Local Number 93 v. City of Cleveland is the most recent case addressing the right of affected third parties to challenge Title VII consent decrees.[128] *Local Number 93* involved a Title VII consent decree negotiation between an association of black and hispanic firefighters, called the Vanguards, and the city of Cleveland, Ohio.[129] When the original parties reached an agreement the district court held a two-day hearing to consider the fairness of their proposed decree.[130] The firefighters union, intervening on behalf of the majority employees, participated in the hearing and objected both to the affirmative action plan proposed in the agreement, and to the fact that the union had not been included in the negotiations.[131] The district court judge asked to approve the proposed consent decree stated that he was "appalled that these negotiations leading to this consent

---

[120] *Id.* at 1126 (citing Franks v. Bowman Transp. Co., 424 U.S. 747, 775–78 (1976)).

[121] Kirkland v. N.Y. State Department of Correctional Services, 711 F.2d 1117, 1132 (2d Cir. 1983).

[122] 664 F.2d 435 (en banc) (5th Cir. 1981).

[123] *Id.* at 436 (Rubin, J., concurring).

[124] *Id.* at 439 (Rubin, J., concurring).

[125] *See id.* at 446–47 (Rubin, J., concurring).

[126] *Id.* at 442 (Rubin, J., concurring).

[127] *Id.* (Rubin, J., concurring). *See also* W.R. Grace & Co. v. Local Union 759, 461 U.S. 757 (1983). In *W.R. Grace & Co.*, the employer entered into a conciliation agreement with the EEOC which required that it maintain the existing percentage of female employees in the event of layoffs, contrary to the seniority-based layoffs required by the collective bargaining agreement. *Id.* at 760. When the employer adhered to the affirmative action plan, male employees brought an arbitration action. *Id.* at 762–63. The court upheld the arbitration finding in favor of the male employees, stating that the pro-settlement policy of Title VII did not permit the modification of a collective bargaining agreement without a judicial determination. *Id.* at 771. See Note, *Collateral Attacks*, at 170–71, for full discussion of *W.R. Grace & Co.*

[128] 106 S. Ct. 3063 (1986).

[129] *Id.* at 3066.

[130] *Id.* at 3068.

[131] *Id.*

decree did not include the intervenors."[132] He deferred the proceeding and ordered the city and the Vanguards to engage the union in discussion.[133]

The parties then negotiated a new proposal but it was defeated when submitted to the union membership.[134] Subsequently, the city and the Vanguards filed a second proposed consent decree with the court.[135] Although the court heard the objections of the union to the decree, it determined that the objections were insufficient to overcome both the express admission of past discrimination by the city, and the statistical evidence presented by the other parties.[136] Specifically, the city and the minority plaintiffs had stipulated that in 1980 the percentage of minority residents in Cleveland was 46.9% but the percentage of minority firefighters holding the rank of Lieutenant or above was only 4.5%.[137] The district court, therefore, entered the decree over the union's objections but maintained jurisdiction over any subsequent claims or motions.[138] The union appealed the decision to the Sixth Circuit, which affirmed the district court's ruling.[139]

On appeal to the Supreme Court, the union claimed that section 706(g) of Title VII precludes a court from approving Title VII relief which benefits individuals who are not the actual victims of the employer's discrimination.[140] This claim was an expanded reading of *Firefighters v. Stotts*,[141] decided by the Supreme Court after the district court entered the consent decree. In *Stotts*, the Court held that section 706(g) of Title VII prevented a district court from ordering the modification of a consent decree to include racially based lay-off protection.[142] In *Local Number 93*, the union claimed that the term "order" in section 706(g) also included the court's entry of a consent decree, and hence that the affirmative action plan contained in the consent decree violated Title VII.[143] The Supreme Court rejected this contention, holding that whatever the limits of a court-ordered affirmative action plan, a voluntary Title VII consent decree may exceed those limits and include "reasonable race-conscious relief that benefits individuals not the actual victims of discrimination."[144]

Although the Court concluded that a consent decree can include affirmative action, the Court recognized the union's right to present evidence and have its objections heard at the consent decree hearings.[145] The Court, however, made no explicit reference to the right of majority employees to intervene in the consent decree proceedings, nor did the Court expressly reject the district court's decision to include the union as intervenors

---

[132] *Id.*

[133] *Id.*

[134] *Id.* at 3069.

[135] *Id.*

[136] *Id.* at 3070.

[137] Vanguards v. City of Cleveland, 753 F.2d 479, 482 (6th Cir. 1985).

[138] *Local Number 93*, 106 S. Ct. at 3070.

[139] *Vanguards*, 753 F.2d at 479.

[140] *See Local Number 93*, 106 S. Ct. at 3071.

[141] 467 U.S. 561 (1983).

[142] *Id.* at 576–83. The *Stotts* Court struck down a court-ordered affirmative action layoff provision when it concluded that the district court's modification of a consent decree was covered by § 706(g), which prohibits court orders that require employment preferences for any reason other than remedying discrimination. *Id.*

[143] *Local Number 93*, 106 S. Ct. at 3071, 3073–74.

[144] *Id.* at 3072.

[145] *Id.* at 3079.

of right.[146] Thus, the Court apparently recognized that under some circumstances majority employees may intervene and raise claims against the proposed consent decree.[147]

While the district court granted the union status as an intervenor of right, the union ultimately could not block the affirmative action settlement.[148] Although the Supreme Court noted that a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree,[149] the Court held that the union could not block the decree in this case because the decree did not bind the union "to do or not to do anything."[150] The Court also reasoned that the consent decree did not purport to resolve any claims the union might have under the fourteenth amendment or Title VII.[151] The Court ruled that the plaintiffs must bring these claims to the district court "which has retained jurisdiction to hear such challenges."[152]

The Court reasoned that in entering the consent decree the district court did not decide the union's underlying claims of impermissible reverse discrimination.[153] Instead, the Court explained, the consent decree embodied the agreement of the parties, rather than the force of the law upon which the complaint originally was based.[154] Thus, the Court continued, a third party intervenor could not block the ability of other parties to settle their own disputes and withdraw from the litigation.[155]

Justice Rehnquist dissented to the Court's opinion in *Local Number 93*.[156] He primarily objected to the Court's finding that a consent decree is not an "order" within the meaning of section 706(g).[157] The Justice argued that the decree "*does* bind" the City of Cleveland to give preferential promotions to minority firefighters ahead of nonminority union members who would have been promoted otherwise.[158] Justice Rehnquist would hold, therefore, that the consent decree does create obligations upon the union in that some of its members are "obviously injured."[159]

Moreover, Justice Rehnquist disagreed with the majority's reasoning that the third party intervenor need not assent to enter a consent decree.[160] Because the cases relied

---

[146] *Id.* at 3066–73.

[147] *See id.* at 3079–80. Furthermore, by granting certiori, the Court implicitly recognized that the union had standing to object to the decree.

[148] *Id.* at 3079.

[149] *Id.*

[150] *Id.* at 3080.

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.* at 3076–77.

[155] *Id.* at 3079 (*citing* Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 392, 400 (1982); Kirkland v. New York State Dep't of Correctional Servs., 711 F.2d 1117, 1126 (2d Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984)). The Court noted that in other legal contexts settling parties may not dispose of the claims of a third party, and if properly raised these claims remain and may be litigated by the intervenor. *Id.* at 3079.

[156] *Id.* at 3082 (Rehnquist, J., dissenting).

[157] *See id.* at 3083–84 (Rehnquist, J., dissenting). To support this conclusion Justice Rehnquist addressed the issue of the consent decree's impact on the union's position. The Justice argued that the obligations of the City of Cleveland under the decree and the union's claims were not as disparate as the majority described. He called the finding that the decree does not bind the union "pharisaical." *Id.* (Rehnquist, J., dissenting).

[158] *Id.* at 3083 (Rehnquist, J., dissenting).

[159] *Id.* (Rehnquist, J., dissenting).

[160] *Id.* at 3084 (Rehnquist, J., dissenting).

upon by the majority involved permissive intervenors, rather than intervenors of right, Justice Rehnquist noted, the cases did not support the majority's conclusion.[161] Permissive intervenors, Justice Rehnquist stated, typically become parties only to ward off the potential effects of *stare decisis*, whereas an intervenor of right becomes a party because the disposition of the action may "as a practical matter impair or impede" its ability to protect its interest.[162] Justice Rehnquist suggested that the majority's theory that a court may resolve a three-party dispute by entering a consent decree over the objection of an intervenor of right was therefore a novel proposition.[163] Justice Rehnquist argued that only a judicial decree which draws upon the coercive power of the court could overcome the objections of an intervenor of right.[164] Accordingly, Justice Rehnquist would have held that if the district court did not require the union's assent for the entry of the consent decree, then such a decree is a coercive "order" within the meaning of *Stotts* and section 706(g).[165]

In sum, Congress designed Title VII to redress employment discrimination through broad institutional remedies voluntarily negotiated between the employer and the minority group. Often, however, these remedial programs substantially affect the employment positions and expectations of nonminority employees. Many courts have denied these third parties the chance to challenge the affirmative action content of these agreements. Although other courts have included nonminority parties in the negotiation stage of the consent decree, as either permissive intervenors or intervenors of right, their procedural right to litigate nonetheless remains unresolved.

II. Equal Protection Restraints on Affirmative Action

When private employers implement voluntary affirmative action plans through consent decrees, they are subject only to the requirements of Title VII. Where the employer is a public body, however, it must also adhere to the requirements of the Constitution. The equal protection clause of the fourteenth amendment provides an additional set of guidelines for affirmative action plans adopted by a public employer, as well as providing an independent ground for majority employees to claim that racial preferences for minorities are unlawful.

The equal protection clause of the fourteenth amendment commands that no state shall deny any person equal protection of the law.[166] The Reconstruction Congress

---

[161] *Id.* (Rehnquist, J., dissenting).

[162] *Id.* (Rehnquist, J., dissenting).

[163] *Id.* (Rehnquist, J., dissenting).

[164] *Id.* (Rehnquist, J., dissenting).

[165] *Id.* (Rehnquist, J., dissenting). Justice Rehnquist quoted from 1B J. Moore , J. Lucas, & T. Currier, Moore's Federal Practice ¶ 0.409[5] (2d ed. 1984): "'But the fact remains that the judgment is not an *inter partes* contract; the Court is not properly a recorder of contracts, but is an organ of government constituted to make decisions and when it has rendered a consent judgment it has made an adjudication.'"

Justice Rehnquist makes this argument primarily to dispute the majority's holding that the term "order of the court" in § 706(g) does not apply to a consent decree. *Local Number 93*, 106 S. Ct. at 3083, (Rehnquist, J., dissenting). By his reasoning, therefore, the affirmative action plan at issue is prohibited by § 706(g). *Id.* at 3085 (Rehnquist, J., dissenting). The idea that intervenors of right cannot be precluded from fully litigating the affirmative action elements of consent decrees follows implicitly. *Id.* at 3084 (Rehnquist, J., dissenting).

[166] The equal protection clause states, in pertinent part: "No state shall make or enforce any

enacted the fourteenth amendment to grant by constitutional decree equal rights to black persons.[167] In the last forty years, however, courts have interpreted the clause to prohibit all racial classifications which disadvantage members of minority groups.[168] In more recent years, "majority" groups, such as white males, also have used the equal protection clause to strike down affirmative action plans which grant preferences to minorities.[169]

In applying the equal protection clause, the Supreme Court has developed several tiers of review depending on the group classified.[170] Courts apply "strict scrutiny" to government classifications which distinguish persons on the basis of "suspect" categories, which generally include race and national origin.[171] Although the Court has most often applied strict scrutiny to laws which discriminate against racial minorities,[172] it has held that strict scrutiny also operates against "racial . . . distinctions of any sort," including classifications discriminating against white persons.[173] Strict scrutiny requires the government to satisfy a two-prong test: first, the suspect classification must serve a compelling state purpose; and second, it must use the least restrictive means to achieve that purpose.[174]

When faced with the claims by majority groups that affirmative action plans designed to remedy the effects of past unlawful discrimination are themselves violative of the equal protection clause, the members of the Supreme Court have failed to agree upon a consistent method of analysis.[175] Nonetheless, there has been a degree of consensus on the requirements of permissible affirmative action. A majority of the Court has confirmed that a public body may voluntarily implement racial classifications which are intended to remedy that body's previous racial discrimination, reasoning that the elimination of the present effects of past discrimination is a sufficiently important governmental interest.[176] Generally, if the affirmative action plan seeks to remedy past discrimination the governmental body first must make some evidentiary finding of that discrimination. The re-

---

law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The Supreme Court has held that the due process clause of the fifth amendment applies in an identical manner to the federal government. *See* Bolling v. Sharpe, 347 U.S. 497 (1954).

[167] *See* J. MCPHERSON, ORDEAL BY FIRE: THE CIVIL WAR AND RECONSTRUCTION (1982).

[168] *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954). *See generally* J. NOWAK, R. ROTUNDA AND J. YOUNG, CONSTITUTIONAL LAW, §§ 14.8–14.9 (3d ed. 1986) [hereinafter NOWAK, CONSTITUTIONAL LAW].

[169] *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (Court ordered plaintiff's admission to medical school). These claims often are referred to as reverse discrimination claims.

[170] *See* NOWAK, CONSTITUTIONAL LAW, *supra* note 168, at § 14.3. Suspect classifications such as race receive strict scrutiny. Classifications based on sex are reviewed under an intermediate level of scrutiny. Classifications which involve no protected group must be rationally related to a legitimate legislative objective. *See id.*

[171] *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 216 (1944) (national origin).

[172] *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-6 (1978).

[173] *Bakke*, 438 U.S. at 291 (opinion of Powell, J.).

[174] *See Wygant*, 106 S. Ct. 1842 (1986); *see also* United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938). *See also* NOWAK, CONSTITUTIONAL LAW at § 14.3 ("This test is identical to that employed in the post 1937 decisions on fundamental rights under the due process concept.").

[175] Fullilove v. Klutznick, 448 U.S. 448 (1979) (plurality opinion); *See Bakke*, 438 U.S. at 265 (plurality opinion).

[176] *See* Sheetmetal Workers v. EEOC, 106 S. Ct. 3019 (1986); *Wygant*, 106 S. Ct. 1848–50 (dicta).

medial affirmative action plan then established must be closely related to the purpose of eliminating that discrimination.[177]

In developing the first part of the test, the Court considered in the school desegregation cases what sort of findings of prior discrimination are necessary to serve as the factual predicate of a valid remedial affirmative action plan. In the 1954 case of *Brown v. Board of Education*, the Supreme Court held that a segregated school system was *per se* discriminatory, and that its very existence supplied the evidentiary foundation that justified the federal courts' use of racial classifications to achieve desegregation.[178] The Court later confirmed that the history of racial segregation empowered both the federal courts and the school boards to adopt sweeping remedial racial plans.[179] Although the Court did not require a fully adjudicated finding of fact concerning the discriminatory harm in order to support remedial racial classifications as constitutionally permissible, the Court nonetheless found that a clear history of pervasive discrimination made evidentiary findings of discrimination unnecessary in school desegregation cases.[180]

In seeking to eliminate less obvious forms of discrimination through affirmative action plans, however, public bodies have encountered constitutional obstacles raised by third parties.[181] Unlike school segregation, courts face a very different situation when affirmative action is used either to remedy discrimination that is viewed as less clearly the result of the public body's own actions, or as an effort to address a more generalized "societal" problem.[182] Majority groups attacking affirmative action plans have alleged that the employer has made insufficient findings of prior discrimination, or that the plans are overly broad and unlawfully benefit minorities and disadvantage majorities more than is necessary to achieve the stated end.[183] Plaintiffs also have argued that any racial preference granted to individuals not the adjudicated victims of unlawful discrimination violates the equal protection clause.[184]

The touchstone of constitutional analysis of affirmative action is the 1978 case of *Regents of the University of California v. Bakke*.[185] In a plurality opinion, the Court found a University of California medical school affirmative action plan unconstitutional, but did not prohibit the use of racial classifications in the admissions process.[186] The medical school opened in 1968, and in the next two years the faculty unilaterally devised a system of racial quotas to increase the representation of "disadvantaged" students.[187] The plan

---

[177] *See Wygant*, 106 S. Ct. at 1852–55 (O'Connor, J., concurring).

[178] 347 U.S. 483, 493, 495 (1954).

[179] *See, e.g.*, McDaniel v. Barressi, 402 U.S. 39, 41 (1971). In *McDaniel*, the Court stated that school boards which operate dual systems were "charged with the affirmative duty" to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated. *Id.* at 41 (quoting Green v. County School Bd., 391 U.S. 430, 437–38 (1968)). The "affirmative duty to disestablish the dual school system" necessarily included the ability of the school board to find that such a dual system exists. *Id.* After *McDaniel* it appeared that a school board's determination that it must institute a remedial racial plan because it is operating a segregated system is not open to serious factual dispute.

[180] *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[181] *E.g.*, *Bakke*, 438 U.S. at 265.

[182] *Id.* at 307.

[183] *Id.*

[184] Chief Justice Rehnquist and Justice Powell support this position. *See Fullilove*, 448 U.S. at 530 n.12 (Powell, J., dissenting).

[185] 438 U.S. 265 (1978).

[186] *Id.* at 271–72 .

[187] *Id.* at 272–77.

entailed a separate admissions program for minority applicants and set aside 16 spaces of a class of 100 for minority students.[188] Bakke was a white male who was rejected in two successive years although his qualifications were higher than many of those accepted in the separate minority program.[189]

In *Bakke* there was no issue of past discrimination by the university because the medical school had never had a policy of excluding minorities.[190] The university claimed instead that the plan served other compelling goals, including an effort to alleviate societal discrimination, achieve classroom diversity, and increase the quality of healthcare for minorities.[191] Bakke argued that none of these purposes justified the denial of his admission because of his race.[192]

Unfortunately, the plurality opinion in *Bakke* did not provide clear guidance on the standards of constitutional review for affirmative action plans. Instead, in a series of opinions, various parts of the Court's holding emerged. In an opinion authored by Justice Stevens, four justices expressed no view on the propriety of a remedial affirmative action program, but found that the university's program violated Title VI.[193] In an opinion written by Justice Brennan, four other justices would have sustained the program as an appropriate response to general societal discrimination against minorities.[194] Justice Powell wrote for the Court and borrowed parts of the other opinions in reaching his own standard. He rejected the use of a remedial admissions program to respond to general societal discrimination, but would have allowed the use of race as a factor in admissions in order to achieve a diverse student body.[195] Justice Powell concluded that the program before the Court was invalid, however, because the rigid quota was more restrictive than necessary.[196] Accordingly, the Court found the plan unconstitutional and ordered Bakke admitted to the medical school.[197]

Powell rejected the university's argument that the plan was necessary to remedy "societal discrimination."[198] Racial classifications seeking to remedy past discrimination, the Justice asserted, must be linked to a more specific practice than that shown in this case.[199] Justice Powell found that a classification that "aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals" is uncon-

---

[188] *Id.* at 274–75.

[189] *Id.* at 276–78.

[190] *Id.* at 305.

[191] *Id.* at 306.

[192] *Id.* at 277–78.

[193] *Id.* at 408. Title VI of the Civil Rights Act of 1964 prohibits discrimination by institutions receiving federal funds. 42 U.S.C. § 2000d (1982).

[194] *Bakke*, 438 U.S. at 328. Justices Brennan, White, Marshall, and Blackmun would permit states to use race-conscious remedies "where there is reason to believe that the evil addressed is a product of past discrimination." *Id.* at 366. In response to Powell's two prong requirement that an affirmative action plan serve a compelling state interest and be narrowly tailored to achieve that interest, these four Justices would require that benign racial classifications serve important governmental objectives and be substantially related to the achievement of those objectives. *Id.* at 359. In addition, the Justices would require an independent inquiry into whether the preference "stigmatizes any discrete group or individual and whether race is reasonably used in light of the program's objectives." *Id.* at 373.

[195] *Id.* at 314–15.

[196] *Id.* at 315–19.

[197] *Id.* at 320.

[198] *Id.* at 307–10.

[199] *Id.*

stitutional in the absence of judicial, legislative, or administrative findings of prior unlawful discrimination.[200]

Justice Powell also concluded that the Regents of the University, "as isolated segments of our vast governmental structures," were not competent to make findings and decisions about the necessity of remedial racial plans not directly related to their own previous discrimination, "at least in the absence of legislative mandates and legislative determined criteria."[201] Thus, not only did the plurality agree that the university's purpose in seeking to remedy societal discrimination was too broad to rise to the level of a compelling state interest, but, under the circumstances, the university was not competent to make such a finding.[202]

After *Bakke*, governmental bodies could unilaterally implement remedial affirmative action plans only if they had made a valid finding of their own past discrimination.[203] A valid finding requires identifying a sufficient level of discrimination by the governmental body itself, and determining that the body is competent to make such a finding.[204] *Bakke* further established that nonminorities may have standing under the equal protection clause to claim that an affirmative action plan does not satisfy these requirements.[205]

Many courts found that *Bakke*'s fragmented decision failed to provide clear guidance for resolving challenges to affirmative action plans.[206] Most recently, in *Wygant v. Jackson Board of Education*, the Supreme Court was again unable to agree on a consistent approach to affirmative action.[207] In a plurality opinion Justice Powell garnered the votes of three other Justices to support his view of a valid affirmative action plan.[208] *Wygant* involved a collective bargaining agreement between the Jackson Board of Education and the teachers union which provided that if it became necessary to lay off teachers, those with the most seniority would be retained, except that at no time would there be a greater

---

[200] *Id.* at 307. The Court viewed the university's broad remedial purpose as the result of too amorphous a concept of injury, for there was "no judicial determination of a constitutional violation as a predicate for the formulation of a remedial classification." *Id.* at 301.

[201] *Id.* at 309.

[202] *Id.* at 309–10.

[203] *See Wygant*, 106 S. Ct. at 1846–47.

[204] *See Bakke*, 438 U.S. at 309–10.

[205] *Id.*

[206] *See, e.g.*, United States v. City of Miami, 614 F.2d 1322, 1337 (5th Cir. 1980) (en banc). After attempting to discern the constitutional standard to be applied to affirmative action plans, the Fifth Circuit noted, "[we] frankly admit that we are not entirely sure what to make of the various *Bakke* opinions. In over 150 pages of United States Reports, the Justices have told us mainly that they have agreed to disagree." *Id.*

Furthermore, Fullilove v. Klutznick, 448 U.S. 448 (1979), decided the following year, afforded little additional clarity. In *Fullilove*, the Court faced the constitutionality of a congressional decision to implement a ten percent set-aside in favor of minority contractors for public works contracts. 448 U.S. at 454. The decision of the Court by Chief Justice Burger refused to link *Fullilove* to any of the *Bakke* standards, finding only that Congress had the particular power under § 5 of the fourteenth amendment to institute such a plan. *Id.* at 476–78.

The Sixth Circuit, quoting *City of Miami* as noted above, added, "[w]e do not believe that the Court's subsequent decision in *Fullilove* has significantly clarified the Supreme Court's stance on this issue." Bratton v. City of Detroit, 704 F.2d 878, 885 n.21 (6th Cir. 1983).

[207] 106 S. Ct. 1842 (1986). The Court rendered a plurality opinion in which Chief Justice Burger and Justices Rehnquist and O'Connor joined Justice Powell.

[208] Justice White concurred in the judgment but did not articulate any standard. *Id.* at 4487 (White, J., concurring).

percentage of minority personnel laid off than the percentage of minorities working at the time of the layoff.[209] When layoffs became necessary the Board adhered to the agreement and laid off nonminority teachers while minority teachers with less seniority were retained.[210] Nonminority teachers displaced through this process brought suit, claiming that the affirmative action component of the collective bargaining agreement violated the equal protection clause of the fourteenth amendment.[211]

Writing for the Court in a five to four decision, Justice Powell held that the plan violated the equal protection clause.[212] Because the school board had made no specific findings of discrimination against minority teachers, but instead based its plan on the need to remedy "societal discrimination" in part through classroom role models, the state had no compelling remedial purpose to support the racial classification.[213] In addition, the Court found that even in order to achieve a compelling state purpose, the lay-off provision was not sufficiently narrowly tailored.[214] The Court concluded that the affirmative action plan thus failed both parts of the test.[215]

In determining that the school board had not found a compelling purpose to support its racial classification, Justice Powell emphasized the need for "particularized findings" of past discrimination by the employer to support employment affirmative action.[216] The Justice noted that the Court had never held societal discrimination alone sufficient to justify a racial classification.[217] Rather, Powell stated, the Court has insisted upon "some showing of prior discrimination by the governmental unit" involved before allowing limited use of racial classifications in order to remedy such discrimination.[218] Justice Powell reasoned that such evidentiary support is crucial when the remedial program is challenged in court by nonminority employees.[219]

Although the school board argued before the Supreme Court that it had discriminated in its hiring practices, at the lower court levels the school board had asserted only the more general remedial purpose of remedying "societal" discrimination.[220] In her concurring opinion, Justice O'Connor reasoned that the lower courts had accepted this purpose because they assumed that in the absence of specific, contemporaneous findings of discrimination, the school board's affirmative action plan could only address societal discrimination.[221] While Justice O'Connor agreed with the majority's conclusion that remedying societal discrimination was not a sufficiently compelling state interest, she rejected the lower courts' assumption that specific findings were needed to find discrim-

---

[209] *Id.* at 1845.

[210] *Id.*

[211] *Id.* Title VII was not at issue because the plaintiffs had not fulfilled its jurisdictional requirements. *Id.* at 1845–46.

[212] *Id.* at 1852.

[213] *Id.* at 1857.

[214] *Id.* at 1847–48. The lower courts applied the test of reasonableness to the relation of the means to the end, a test drawn from Justice Brennan's *Bakke* concurrence. Justice Powell found "that standard has no support in the decisions of this Court."

[215] *Id.* at 1848, 1852.

[216] *Id.* at 1848.

[217] *Id.* at 1847.

[218] *Id.*

[219] *Id.* at 1848.

[220] *See Id.* at 1847.

[221] *Id.* at 1854 (O'Connor, J., concurring).

ination more narrowly defined than merely "societal."[222] Instead, Justice O'Connor asserted that contemporaneous findings of actual discrimination were not necessary to validate an affirmative action plan "as long as the public actor has a firm basis for believing that remedial action is required."[223]

Justice O'Connor based this evidentiary standard on her support of the goal of the voluntary elimination of discrimination.[224] She cited the Court's and Congress's consistent emphasis on voluntary efforts to further the objectives of the fourteenth amendment.[225] Imposing a contemporaneous findings requirement, Justice O'Connor argued, would "produce the anomalous result" of permitting private employers to voluntarily correct apparent violations of Title VII, as in *Weber*, while "public employers [would be] constitutionally forbidden to . . . correct their statutory and constitutional transgressions."[226]

Although the majority also indicated that a specific and contemporaneous finding of unlawful discrimination is not necessary for the correction of past discrimination to rise to a compelling purpose, the majority did not state clearly what would constitute the required "strong basis in evidence" to show past discrimination.[227] In her concurrence, Justice O'Connor suggested that the equal protection clause's evidentiary requirement should be more lenient in order to accommodate Title VII affirmative action plans.[228] In her view, courts should follow the evidentiary standards delineated in *Weber*'s Title VII analysis.[229] Thus, Justice O'Connor would find that evidence of discrimination sufficient to support a prima facie case under Title VII also would create a "compelling basis for a competent authority" to conclude that a voluntary affirmative action plan serves a compelling state interest under the fourteenth amendment.[230] Nonminorities, the Justice continued, then would have the opportunity to prove that the evidence is insufficient to support an inference of prior discrimination, or that the plan instituted on the basis of this evidence was not sufficiently narrowly tailored.[231] It is the nonminority plaintiffs, the Justice explained, who bear the burden of proving the inadequacy of the employer's asserted evidence.[232]

In sum, a valid affirmative action plan under the equal protection clause must survive the two-pronged strict scrutiny test as delineated by Justice Powell in *Bakke* and *Wygant*. First, the plan must be proposed pursuant to a compelling governmental purpose. For a voluntary racial plan, the governmental body must show both a compelling purpose and competency to make that determination. Second, the plan must be narrowly tailored, or the least restrictive possible means to achieve the compelling interest. Individuals adversely affected by voluntary affirmative action have had some success in challenging such plans on the grounds that they violate this test.

---

[222] *Id.* (O'Connor, J., concurring).

[223] *Id.* at 1855 (O'Connor, J., concurring).

[224] *See id.* (O'Connor, J., concurring).

[225] *Id.* (O'Connor, J., concurring).

[226] *Id.* (O'Connor, J., concurring).

[227] *Id.* at 1849.

[228] *Id.* at 1855 (O'Connor, J., concurring).

[229] *Id.* (O'Connor, J., concurring).

[230] *Id.* (O'Connor, J., concurring). Justice O'Connor suggested that, as in Title VII cases, statistical evidence of disparity between minority employees and qualified minorities in the area will be sufficient to state a prima facie case, and will be difficult to refute. *Id.* (O'Connor, J., concurring).

[231] *Id.* (O'Connor, J., concurring).

[232] *Id.* (O'Connor, J., concurring).

III. The Relationship between Title VII and Equal Protection Claims

A challenger to a public employer's voluntary affirmative action plan may raise claims under both Title VII and the equal protection clause.[233] Yet courts have rarely had occasion to compare directly the operation of the statutory and constitutional laws, and the Supreme Court has explicitly avoided such a comparison.[234] The Court has chosen, thus far, to keep the two analyses distinct.[235]

The district and appellate courts of the Sixth Circuit were among the first to address the issue of the relationship between Title VII and equal protection claims involving voluntary affirmative action plans. In 1974 the Detroit Board of Police Commissioners determined that the police department had and was continuing to engage in racial discrimination.[236] Unilaterally, and without a Title VII consent decree, the department ordered wide ranging affirmative action,[237] including a "goal" of one-for-one hiring and promotion of whites and nonwhites in the department.[238] After several years, this plan resulted in the promotion of non-white police officers ranked lower on the promotion list before or instead of white police officers ranked higher on the list.[239] This, in turn, led to a flood of litigation when white police employees challenged the affirmative action plan on both Title VII and equal protection grounds.[240]

In 1975, white police sergeants passed over for promotion brought suit to challenge the affirmative action plan.[241] The district court in *Baker v. City of Detroit* concluded that it should review voluntary affirmative action plans implemented by public employers solely under the standards of Title VII.[242] If found valid under the test articulated in

---

[233] *See, e.g.*, Bratton v. City of Detroit, 704 F.2d 878, 881 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

[234] *See Local Number 93*, 106 S. Ct. at 3073 (Court noted the issue but declined to resolve it). As the Sixth Circuit noted, the *Bakke* equal protection case was not cited as authority for the ultimate resolution of the Title VII issues in the *Weber* case, and the Court did not later rely on *Weber* when it returned to the constitutional bounds of permissible affirmative action in *Fullilove*. *Bratton*, 704 F.2d at 884 n.19.

[235] *But see* Sheetmetal Workers v. EEOC, 106 S. Ct. 3019 (1986). In *Sheetmetal Workers*, the Supreme Court reviewed an affirmative action plan ordered by the district court after the court found the union guilty of racial discrimination in violation of Title VII after a trial on the merits. Because the court could order only such relief that also was within the bounds of the Constitution, the appellate and Supreme Court reviewed the legality of the affirmative action ordered by the district court under both Title VII and the Constitution. *Id.* As *Stotts* and *Local Number 93* recognized, however, the standards under Title VII are different if the affirmative action is voluntary as compared with court-ordered. The Supreme Court has not addressed the relationship between Title VII and the equal protection clause in the context of *voluntary* affirmative action plans. *See Local Number 93*, 106 S. Ct. at 3074–75; *Stotts*, 467 U.S. at 583. In *Sheetmetal Workers*, the Supreme Court held that there was sufficient evidence for the factfinder to have ordered affirmative action relief under both Title VII and under the most rigorous equal protection test. *Sheetmetal Workers*, 106 S. Ct. at 3054.

[236] Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 681 (6th Cir. 1979).

[237] *Bratton*, 704 F.2d at 882–83.

[238] *Id.* at 882. The department contained three primary ranks: patrolman, sergeant, and lieutenant, and for several years promotions from one rank to the next were made on the basis of the one-for-one goal. *Detroit Police Officers*, 608 F.2d at 681.

[239] *Bratton*, 704 F.2d at 882.

[240] *Bratton* was the consolidation of several district court actions. *Id.* at 879.

[241] Baker v. City of Detroit, 483 F. Supp. 919, 937 (E.D. Mich. 1979).

[242] *Id.* at 930, 991.

the Title VII *Weber* case, the court concluded that the plan also "should pass muster under the Constitution."[243] The *Baker* court reasoned that because the Supreme Court has stressed the need for voluntary efforts to eliminate past discrimination, courts should apply the constitutional analysis of voluntary plans coextensively with the standards of Title VII.[244]

The same evidentiary factors of racial imbalance and traditionally segregated job categories that the Supreme Court identified in *Weber*, the *Baker* court stated, provide a sound basis for constitutional analysis.[245] The court recommended that a finding by a public employer that racial imbalance exists in a traditionally segregated job category, for the purpose of Title VII, should be equated with a finding that the employer had failed in its equal protection duty to remedy the present effects of past discrimination.[246] Thus, the court continued, the employer's implicit or explicit finding of past discrimination would have the same directness and reliability as that required by Justice Powell's equal protection standard applied in *Bakke*.[247] The *Baker* court thus approved the police department's voluntary plan as an appropriate response to the department's prior discrimination.[248]

The *Baker* court further reasoned that equal protection challenges to affirmative action should follow Title VII analysis because public employers require a measure of discretion to formulate remedial plans.[249] The court reasoned that if the constitutional limitations on affirmative action were too restrictive, this would make it difficult for a public employer to pursue the remedial action required by Title VII.[250] The public employer would face a dilemma: the "risk of suit by one side or the other no matter what it does."[251] In other words, the court explained, under a restrictive construction of the equal protection clause, an employer who took no action to correct the present effects of past or present discrimination might violate Title VII, yet affirmative action could result in liability to affected nonminorities under the equal protection clause.[252] The court rejected this constitutional interpretation, noting that private employers faced the same dilemma before *Weber*, and that the Supreme Court had upheld private sector affirmative action in part to alleviate the problem.[253] The same area of reasonable discretion in the voluntary implementation of remedial plans approved in *Weber*, the court found should apply to a public employer's decision to remedy what it reasonably believed to be past discrimination on its part.[254]

---

[243] *Id.*

[244] *Id.*; *see also* NAACP v. Beecher, 679 F.2d 965, 975–78 (1st Cir. 1982) (In simultaneous Title VII and equal protection claims, court applied the *Weber* standard foremost among others).

[245] *See Baker*, 483 F. Supp. at 990–91.

[246] *Id.* at 991.

[247] *Id.* In reference to Justice Powell's *Bakke* opinion, the court quoted the factors of "'disabling effects of identified discrimination,' and 'judicial, legislative, or administrative findings of constitutional or statutory violations,' which in his eyes would justify a preference." *Id.* (quoting *Bakke*, 438 U.S. at 307).

[248] *Id.* at 1003.

[249] *Id.* at 991.

[250] *Id.*

[251] *Id.*

[252] *See id.*

[253] *Id. See also Weber*, 443 U.S. at 210–11 (Blackmun, J., concurring).

[254] *Baker*, 483 F. Supp. at 991. Although the district court ventured the proposition that *Weber*'s Title VII standard should apply equally to the public sector, it realized that its views might not be

The Court of Appeals for the Sixth Circuit upheld the district court's holding in favor of the affirmative action plan in *Bratton v. City of Detroit*.[255] The appellate court, however, did not accept the lower court's reading of the relationship between Title VII and the equal protection clause.[256] The Sixth Circuit noted that when the Supreme Court decided *Weber*, the Court gave no indication that had the plan before it been "subject to the strictures of the fourteenth amendment, the test of permissibility would have been the same."[257] Thus, the *Bratton* court declined to accept the *Weber* standard as determinative of the constitutional question.[258]

Yet, after concluding that it was obligated to pursue a separate constitutional analysis of the affirmative action plan, the *Bratton* court openly acknowledged that the Supreme Court's decisions left it unsure what analysis to employ.[259] The court adopted Justice Brennan's approach in *Bakke*, with the addition of Justice Powell's requirement that a competent body make findings of discrimination.[260] Applying this standard to the case, the *Bratton* court found that the police department's prior egregious racial discrimination fully satisfied the constitutional requirements necessary to justify affirmative action.[261] The court also indicated its belief that the case warranted the affirmative action regardless of the precise semantics of the constitutional test.[262]

The Detroit police cases indicate the difficulty courts have had in differentiating and applying Title VII and the equal protection clause to affirmative action plans. Moreover, in these cases the plans were completely self-enacted by the employer. Where the affirmative action plan is negotiated pursuant to a Title VII consent decree, however, the role of the constitutional challenge in the proceedings is further complicated both by the inability of many majority employees to intervene in the proceedings, and when allowed to intervene, the uncertainty of the extent to which they may attack the merits of the affirmative action.[263]

For example, in *Culbreath v. Dukakis*,[264] the Court of Appeals for the First Circuit reviewed the district court's refusal to allow the union's intervention more than four years after consent decree negotiations had begun. The union sought to bring both Title VII and equal protection challenges to the affirmative action plan. The court of appeals noted that denying intervention would forever foreclose the union from challenging the consent decree.[265] The court of appeals further stated that the union could not collat-

---

accepted. *Id.* at 990–91. Hence, it held that whatever standard ultimately is applied, "the sad history of the Detroit Police department" is adequate to sustain some form of affirmative action. *Id.*

[255] 704 F.2d at 878.

[256] *Id.* at 884–85.

[257] *Id.* at 884.

[258] *Id.* The court observed, "[w]hen we cease analyzing the actions of a public employer qua employer and begin to examine the validity of those actions as state action, a constitutional inquiry is appropriate." *Id.*

[259] *Id.* at 885 & n.21.

[260] *Id.* at 885–86, 886 n.29. Although the court distinguished the Constitution and Title VII, it combined them in performing its analysis, finding that because the equal protection standard was more rigorous, a plan found permissible under the Constitution would pass Title VII muster as well. *Id.* at 887.

[261] *Id.* at 887 n.32.

[262] *Id.* at 884–85, 884 n.20.

[263] *See, e.g.*, Local Number 93 v. City of Cleveland, 106 S. Ct. 3063 (1986).

[264] 630 F.2d 15 (1st Cir. 1980).

[265] *See id.* at 22.

erally attack the decree because the same court which denied intervention retained jurisdiction over the decree, and res judicata principles would ban a second challenge in that court.[266] Thus, the court of appeals recognized the difficulties faced by affected third parties in their challenge to consent decrees.[267]

Despite these concerns, the *Culbreath* court refused to allow the union to intervene.[268] The court emphasized that the union had not suffered significant prejudice from its absence from the consent decree proceedings.[269] The court further found that regardless of whether the unions had intervened and pressed their equal protection and constitutional claims, the plaintiffs still were likely to have prevailed on the merits.[270] The court noted that the potential intervenors did not dispute the statistical evidence of racial discrimination in the defendant's employment and promotion practices.[271] Thus, the *Culbreath* court prohibited intervention partly because the challengers were not likely to defeat the plan.[272]

Similarly, the court in *Vanguards v. City of Cleveland* never explicitly addressed the merits of the nonminority reverse discrimination claims.[273] The court did, however, lay out the factors which it considered should comprise a district court's analysis of a Title VII consent decree, a formulation which brought together both equal protection and Title VII analyses.[274] The court stated that when presented with a proposed consent decree, a district court must determine only whether the settlement is fair, adequate, and reasonable.[275] Citing the Sixth Circuit's equal protection analysis in *Bratton*, the *Vanguards* court stated that in making this determination the district court should consider whether the affirmative action plan is reasonably related to the objective of remedying prior discrimination, and whether the plan is fair and reasonable to the affected nonminorities.[276] The court then listed several factors, drawn from *Weber*'s Title VII analysis, that would determine whether the plan impermissibly burdened nonminorities.[277] Thus, without clearly distinguishing equal protection and Title VII, the *Vanguards* court merely noted that because the plan fell within the limits set by *Weber* and those set in cases such as *Bratton*, where the equal protection clause applied, the consent decree did not violate the nonminorities' legal rights.[278]

More recently, the Sixth Circuit court of appeals appears to have abandoned its conclusion in *Bratton* that a public employer's affirmative action plan is subject to separate Title VII and constitutional analysis. In *Youngblood v. Dalzell*, the court affirmed the entry of a consent decree ordering affirmative action in the Cincinnati, Ohio fire de-

---

[266] *Id.*

[267] *Id.*

[268] *Id.* at 25.

[269] *Id.* at 23.

[270] *Id.*

[271] *Id.*

[272] *See id.*

[273] Vanguards v. City of Cleveland, 753 F.2d 479 (6th Cir. 1985), *aff'd sub nom.*, Local Number 93 v. City of Cleveland, 106 S. Ct. 3063 (1986).

[274] *Id.* at 484.

[275] *Id.*

[276] *Id.* (citing *Bratton*, 753 F.2d at 887).

[277] *See id.*

[278] *Id.* at 489 n.10. The Supreme Court did not address this issue in its review of the case. *Local Number 93*, 106 S. Ct. at 3072, 3073 n.8.

partment.[279] The district court permitted the firefighter's union to intervene in the negotiation of the decree, and the union appealed the ultimate decree charging that it violated the equal protection clause.[280] Rather than apply a separate test under Title VII and the equal protection clause, which seemed to be the approach suggested in *Bratton*, the appeals court relied entirely on the Title VII standards articulated in *Weber*.[281] The court noted that in *Local Number 93* the Supreme Court had not reached the issue of whether the equal protection clause requires additional or different analysis than Title VII.[282] In the absence of guidance on this issue, the court determined that it would apply only the Title VII *Weber* test to the constitutional challenge.[283]

The few courts that have attempted to sort out the difference between the requirements of a valid affirmative action plan under Title VII and the Constitution have been unable to formulate clear standards. While courts have rejected the claim that Title VII must be construed coextensively with the fourteenth amendment,[284] most courts also have not accepted the approach that subsumes the equal protection analysis entirely under the standards of Title VII.[285] According to some courts, if the majority employees properly raise both grounds for challenging affirmative action, courts must pursue the two separate lines of analysis.[286] As the *Bratton* court acknowledges, however, what constitutional analysis courts should employ remains unclear.[287]

Consequently, many courts avoid the question through the procedural step of denying majority employees a forum to make either of the two claims.[288] If the affirmative action plan is implemented pursuant to a Title VII consent decree, courts often deny the majority employees' motion to intervene as untimely, and dismiss subsequent efforts to challenge the consent decree as impermissible collateral attacks. Courts thereby escape the necessity of determining the precise relationship between Title VII remedies and equal protection restrictions.

IV. Reconciling Equal Protection Claims with Title VII Consent Decrees in Affirmative Action

In framing Title VII to eliminate employment discrimination, Congress sought to avoid some of the controversy and resentment affirmative action might cause by making

---

[279] 804 F.2d 360 (6th Cir. 1986).

[280] *Id.* at 362–63.

[281] *Id.* at 365.

[282] *Id.*

[283] *Id.*

[284] *E.g.*, Scott v. City of Anniston, 597 F.2d 897, 899–900 (5th Cir. 1979); Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 689 n.7 (6th Cir. 1979); Baker v. City of Detroit, 483 F.Supp. 930, 986 n.106 (E.D. Mich. 1979), *aff'd sub nom.*, Bratton v. City of Detroit, 704 F.2d 878 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984). Plaintiffs in these cases argued that because the congressional power to extend Title VII to the states derived from the fourteenth amendment, rather than the commerce clause, Title VII as applied to the states must be coextensive with the fourteenth amendment. The courts cited above rejected this argument. The *Scott* court stated "whether the employer be private or public, the same prerequisites to Title VII liability apply . . . ." 597 F.2d at 900. The *Detroit Police Officers* court similarly held that "reliance on the fourteenth amendment as the source of legislative power for the 1972 amendments does not limit their substance to the minimum protections provided by the fourteenth amendment." 608 F.2d at 689 n.7 (citing Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)).

[285] *See, e.g.*, *Bratton*, 704 F.2d at 884.

[286] *Id.* at 884–85.

[287] *Id.*

[288] *See supra* notes 93–106 and accompanying text.

voluntary agreements the preferred method of compliance.[289] When courts limit their understanding of who is to participate in the voluntary agreement to minority plaintiffs and their employers, however, the judicial emphasis on conciliation abrogates the due process rights of nonminority workers who make the employment sacrifices for affirmative action. With the lack of guidance from the Supreme Court, lower courts have not developed a clear procedure by which nonminority employees may intervene to raise their claims. Furthermore, when majority employees are included, courts have not agreed on how to preserve the voluntary consent decree when faced with the attempts of the intervenors to litigate the substantive Title VII and constitutional issues.

While the Supreme Court acknowledged a possible conflict between Title VII and equal protection in *Local Number 93*, it declined to involve itself in its resolution. The resulting lack of guidance for lower courts, and more importantly for public employers, threatens the goal of the voluntary eradication of racial discrimination underlying both Title VII and the equal protection clause. Public employers may hesitate to enter into consent decree negotiations without knowing the extent to which the decree will include majority employees. Public employers may perceive the tortuous path of a negotiated settlement under these conditions as holding no advantages over litigation.

This section of the note will examine the extent to which nonminority employees may intervene and raise constitutional challenges to affirmative action plans established by Title VII consent decrees. Section A will review the right to intervene and will suggest that courts permit limited intervention in order to allow majority employees to voice their objections to the proposed remedies. Section B will consider the extent to which courts should allow intervenors to raise equal protection claims, and how such constitutional challenges can be accommodated within the Title VII statutory structure. The note will conclude that Justice O'Connor's concurrence in *Wygant* provides the guidance to reconcile both constitutional and Title VII claims.

A. *Third Party Intervention in Consent Decree Negotiations*

The ability of majority employees affected by an affirmative action plan to intervene in the consent decree proceedings remains unclear. Although the Supreme Court had the opportunity in *Local Number 93* to address the scope of majority employees' right to intervene in Title VII consent decree negotiations, the Court limited its holding to the technical issue of the meaning of Title VII's section 706(g) in relation to consent decrees.[290] Yet the Court's language appears to support the district court's decision to allow limited inclusion of the majority employees in the consent decree negotiations.[291] The Court stated that an intervenor was entitled to present evidence and have its objections heard at the consent decree hearings, but the intervenor does not have the power to block the decrees merely by withholding its consent to the plan.[292] Thus, the Court apparently agreed with the district court's insistence that the union have the opportunity to participate in the consent decree proceedings.

The district court's decision to permit the intervention of the Local Number 93 union, however, may not be a recognition that majority employees have a right to be included in the consent decree negotiations. Instead, it merely may be consistent with

---

[289] 42 U.S.C. § 2000e-5(b) (1982). *See supra* notes 45–48 and accompanying text.

[290] *See Local Number 93*, 106 S. Ct. at 3070–71.

[291] *Id.* at 3078–79.

[292] *Id.*

the *Thaggard* reasoning which protects consent decrees from collateral attack. In *Thaggard* and related cases, the majority employees' motions to intervene were denied as untimely.[293] In *Local Number 93* the majority employees simply realized their interests in time, and were permitted to intervene as a matter of right.[294] Thus, *Local Number 93* may merely demonstrate that upon timely filing majority employees may intervene in consent decree proceedings.[295]

Courts should not interpret *Local Number 93* in this manner. Rather, courts should recognize that the majority employees have a right to be included in the negotiation of consent decrees that may affect their employment rights. As Justice Rehnquist pointed out, majority employees should not be denied the right to raise their objections on res judicata grounds when they never had their day in court.[296] Once third parties are granted the right to intervene and participate in the formation and approval of the decree, it may be appropriate to hold that the agreement is res judicata against them, even if they do not ultimately sign the decree.[297] Thus, courts should allow the intervenors to seek redress of their objections through appeal of the district court's entry of the consent decree.

If courts include the majority employees in the original consent decree proceeding, their intervention raises at least two possible issues: the extent to which the intervenors may force litigation on the merits by refusing to sign the consent decree, and the extent to which potential equal protection claims may alter the Title VII proceeding. Although the majority employees' participation in *Local Number 93* seemed to raise these questions, the Supreme Court found that the intervening union which represented the majority employees had not properly raised the equal protection claim below.[298] The Court therefore declined to resolve the constitutional issue and left the claim to be raised in the district court.[299]

There are various methods by which courts can resolve these issues and include majority employees in the consent decree negotiations. For example, courts could permit intervenors to block the entry of consent decrees and to litigate fully the merits of the discrimination claims against the employer.[300] Courts could grant majority employees the opportunity to prove that affirmative action is unwarranted on the facts of the case,

---

[293] *See supra* notes 104–115 and accompanying text. In *Thaggard*, the majority employees' collateral attack on the consent decree was prohibited, even though they had attempted and failed to intervene. 687 F.2d 66, 67 (5th Cir. 1982). Thus, the majority employees had no opportunity to be heard in regard to the plan.

[294] *Local Number 93*, 106 S. Ct. at 3066.

[295] *Id.* at 3066–67.

[296] Ashley v. City of Jackson, 464 U.S. 900, 901–02 (1983) (Rehnquist, J., dissenting from denial of certiorari).

[297] *Cf. id.* at 902 (Rehnquist, J., dissenting from denial of cert.).

[298] *Local Number 93*, 106 S. Ct. at 3070–71.

[299] The pleadings by the union suggest, however, that they thought they had included an equal protection challenge to the decree as well as the claim based on the restrictive interpretation of § 706g of Title VII. Brief for the Petitioner, at 11, Local Number 93 v. City of Cleveland, 106 S. Ct. 3063 (1986). Yet the Court determined that under the procedural posture of the case, "we have no occasion to address the circumstances, if any, in which voluntary action by a public employer that is permissible under § 703 [of Title VII] would nonetheless be barred by the fourteenth amendment." *Local Number 93*, 106 S. Ct. at 3073 n.8.

[300] Justice Rehnquist appears to take this position. *See Local Number 93*, 106 S. Ct. at 3083 (Rehnquist, J., dissenting).

or allow them to seek to limit race-conscious relief to individual victims only.[301] This approach would make it extremely difficult for employers to settle discrimination claims. The complete vindication of the majority employees' interests in such a manner could come only at the cost of turning the consent decree proceeding into a traditional litigation on the merits.

It is unlikely, however, that courts will allow intervenors to litigate the merits of the claims and block the consent decree in light of the Supreme Court's approval, in *Local Number 93*, of the district court's entry of the consent decree over the objections of the intervening union, and the district court's limitation on the union's right to litigate the issues.[302] Furthermore, permitting intervenors a limited right to challenge is appropriate. The right of the intervenors to litigate the underlying issues would jeopardize the considerable advantages consent decree settlements offer the parties, as well as undermine Congress's intent to encourage voluntary settlement of Title VII claims.[303]

For the minority plaintiffs, the consent decree is a relatively fast and less costly method of redressing discrimination.[304] Although an individual plaintiff may lose potential backpay damages available under Title VII, this loss is often offset by the speed and certainty of the consent decree action as compared with full litigation.[305] The consent decree also generates employer compliance more readily than if the same changes are bitterly disputed and ultimately ordered by a judge.[306]

From the employer's standpoint as well, the consent decree offers numerous advantages. Foremost among these is that through voluntary settlement the employer escapes the potentially enormous cost of litigation.[307] In addition, the employer can limit or eliminate liability for backpay damages. The employer can bargain for prospective minority promotion and hiring quotas in exchange for release from potential financial remedies to actual victims. Furthermore, the employer is in a position to control to a significant degree the shape of the final remedial plan. While the employer must com-

---

[301] During the Reagan Administration the Attorney General's office attempted to enforce this theory by sending a letter, under the signature of Assistant Attorney General William Bradford Reynolds, to 47 cities and states asking them to discard the affirmative action components of consent decrees and judicial orders currently in effect. Washington Post, March 1, 1985, at A3.

[302] *See* Youngblood v. Dalzell, 804 F.2d 360 (6th Cir. 1986). In *Youngblood*, the Sixth Circuit interpreted *Local Number 93* to support the practice of limited majority employee intervention in Title VII consent decrees. Citing *Local Number 93*, the court stated that an intervenor is entitled to have its interests considered in the negotiation process but may not block the entry of the decree by withholding its approval. *Id.* at 364.

Indeed, if courts construe the equal protection clause to require the evidentiary determination of individual victims before an employer or a court may award any race conscious relief, public employers either would have to admit their prior discrimination and present evidence of particular victims in any settlement, or simply enter litigation. The potential liability for backpay to any identified victim of discrimination makes settlement on such terms unlikely. By contrast, private employers would continue to enjoy the prerogatives of consent decree settlements because they are not subject to the requirements of the equal protection clause.

[303] See Schwarzschild, *supra* note 5, at 898–900, for a general discussion of the advantages of consent decrees.

[304] *Id.*

[305] *Id.*

[306] *See* United States v. City of Miami, 664 F.2d 435, 442 (5th Cir. 1981).

[307] *See* United States v. Allegheny-Ludlum Indus., 517 F.2d 826, 851 n.28 (5th Cir. 1975) (in the absence of a consent decree settlement, the extremely complex litigation could have taken 28 years).

promise, it is free to mold the relief to best eliminate the unlawful discrimination and its effects while maintaining the institutional structures most important to the functioning of the workplace.[308]

Finally, an employer may wish to avoid a courtroom confrontation and minimize the public stigma attached to a charge of racial discrimination. A private corporation or public employer may prefer to settle in order to avoid the negative publicity that defending such a charge will entail. This motivating factor is especially important where a municipal employer faces high racial tensions, and a trial over the issues of the history and fault of racial discrimination would inflame an already divided citizenry.[309]

Consent decrees, therefore, offer considerable advantages to employers and minority employees. Yet the efforts of majority employees to challenge their constitutional validity threatens their use. Clearly courts must develop some standard to govern the participation of adverse nonminority parties in the consent decree settlement process without allowing them to block the decrees. Professor Maimon Schwarzschild has proposed a formal policy of limited intervention for majority employees in Title VII consent decree proceedings.[310] In Professor Schwarzschild's view, courts should avoid the outcome of *City of Miami*, where the majority employees were permitted to block the entry of part of the decree. He proposes, rather, that the court should permit the majority employees to intervene solely for the purpose of objecting to the remedy established by the consent decree. The intervenor would not be permitted to argue whether the employer's alleged discriminatory violation supports the remedy.[311] Professor Schwarzschild bases his limited intervention proposal on the assertion that the majority employees' due process rights include the right to be heard and make objections and suggestions in regard to the decree. But these rights do not include the right to force the court to make findings of fact or conclusions of law on the underlying merits of the minority plaintiff's case.[312] Under his approach, courts would only consider the majority employees' objections to the proposed remedy, and refuse to permit the focus of the proceedings to turn to issues concerning the alleged violation.[313]

---

[308] *See generally* Schwarzschild, *supra* note 5, at 898–901, 909–10.

[309] The Detroit Board of Police Commissioners instituted its unilateral affirmative action plan largely to ease racial violence and tension in the community. *See* Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 680 (6th Cir. 1979). The Jackson School Board similarly sought to ease racial violence in the schools through an affirmative action plan implemented in the collective bargaining agreement with the teachers. *See Wygant*, 106 S. Ct. at 1859 (Marshall, J., dissenting).

[310] Schwarzschild, *supra* note 5, at 923.

[311] *See Kirkland*, 552 F. Supp. 667, 668 (1982).

[312] Schwarzschild, *supra* note 5, at 923.

[313] *Id.* Professor Schwarzschild argues that:

> Limited intervention means a day in court to argue whether the terms of a consent decree are reasonable, or to suggest alternatives and modifications. This kind of intervention helps the court to make an informed judgment about the consent decree, without giving the intervenors a license to scuttle the decree or to delay relief by litigating the question of the defendant's liability. Restricting the terms of intervention — not permitting the intervenors to litigate the employer's liability — is consistent with the attenuated relation of remedy to liability that is characteristic of public law. Limited intervention is a vehicle for interested third parties to comment on a proposed decree without being permitted to shift the court's attention away from the remedy and back to the violation.

Id.

Professor Schwarzschild suggests several advantages which would flow from these limited intervention or "fairness" hearings. Most obviously, he asserts, the fairness hearing would force all the parties, and the court, to examine the decree carefully and to explain why it is desirable.[314] Furthermore, the hearing would include the affected parties without sacrificing the voluntary nature of consent decrees.[315] This inclusion would afford affected persons a forum to influence the decree, as the union accomplished in *Local Number 93*.[316] The fairness hearing may even reconcile the majority employees to the necessity of the affirmative action plan. In addition, Professor Schwarzschild observes, if the majority employees are not satisfied with the ultimate consent decree, appellate courts will have a greater opportunity for informed review when the appellant's objections are on the record and the district court has responded to them.[317] The abuse of discretion standard for appellate review of the district court's entry of the decree, he asserts, would be less of an "incantation" if a meaningful record exists from below.[318]

Although the Supreme Court has not explicitly recognized the fairness hearing approach, the Court appears to be cognizant of this position.[319] In *Local Number 93*, the Court reasoned that it was proper not to require the union's approval of the consent decree in part because the union had been given an opportunity to be heard.[320] In addition, although the Supreme Court made no reference to the sort of formalized fairness hearing procedure suggested by Professor Schwarzschild, the Court noted that the district court had allowed the union to voice its objections to the decree and carefully considered these objections before rejecting them.[321]

The fact that the Court referred the union's potential reverse discrimination claims back to the district court, however, may indicate that the Court disagrees with Professor Schwarzschild's suggestion that the intervenors be granted only limited rights. The

---

[314] *Id.* at 931. Specifically, Professor Schwarzschild proposes that when parties submit a Title VII consent decree for judicial approval, the district court should adopt a procedure which includes the following. First, notice such that affected parties will know of the decree. Second, a fairness hearing "open to nonparties as well as plaintiff class members." Interested majority employees should be granted limited intervenor status as the basis of their participation and potentially appeal. Third, the fairness hearings should be sufficiently detailed that the court may "appreciate the equities of the situation." Typically, the record should include the statistical evidence of discrimination upon which the plaintiffs rest their claim. Professor Schwarzschild suggests that several days may be necessary, particularly where a large employer is involved, but that the hearings should not become a forum for the litigation of the underlying claims against the employer. And finally, the court should articulate the reasoning behind its action, explaining why a particular remedial plan is justified and including a reasoned response to objections and suggestions. *Id.* at 929–30.

[315] *Id.*

[316] *See Local Number 93*, 106 S. Ct. at 3068–69.

[317] Schwarzschild, *supra* note 5, at 931–32.

[318] *Id.* at 931.

[319] Although the Court did not rule on the nature of an intervenor's participation in *Local Number 93*, the Court cited Professor Schwarzschild's article to support a less specific proposition in favor of Title VII consent decrees. *Local Number 93*, 106 S. Ct. at 3076 n.13.

[320] *Id.* at 3079.

[321] The Court stated,

> Local 93 took full advantage of its opportunity to participate in the District Court's hearings on the consent decree. It was permitted to air its objections to the reasonableness of the decree and to introduce relevant evidence; the district court carefully considered these objections and explained why it was rejecting them. Accordingly, "the District Court gave the union all the process that [it] was due . . . ."

Id. at 3079 (quoting Zipes v. Trans World Airlines, Inc., 445 U.S. 385, 400 (1982)).

Supreme Court specified that consent decrees are not immune from fourteenth amendment or Title VII attack.[322] Yet the Court did not indicate exactly what rights the intervenors would have to bring such claims before the district court, or if the intervenors could still raise these claims.[323] If the Supreme Court meant that the union could fully litigate those claims, then the Court appears not to support the limited intervention principle of the fairness hearing. Despite this possible interpretation, however, it seems likely that the district court could limit the right of the union to litigate any future challenges in the same manner that the Supreme Court indicated the court could limit challenges before it entered the decree.[324] The Supreme Court's decision in *Local Number 93* does not offer a clear resolution to this question.

Professor Schwarzschild's limited intervention policy resolves in a general way the manner in which courts should include intervenors in the consent decree proceeding. Professor Schwarzschild relies heavily on the active involvement and discretion of the district court in weighing "the equities" of the particular situation.[325] Under his approach, the court should hear and weigh both the initial evidence of discrimination by the minority plaintiffs, and the objections of the intervenors,[326] but limit the intervenors only to the issues relating to the future remedy. In the fairness hearing, majority employees could assert that the terms of the consent decree are not reasonable, and suggest alternatives.[327]

B. *Accommodating Equal Protection Claims in a Consent Decree*

Professor Schwarzschild does not address the ramifications of an equal protection challenge to a public employer's affirmative action consent decree.[328] When a public employer is involved, the Supreme Court's decisions from *Bakke* to *Wygant* require that the public body make sufficient findings of its prior unlawful discrimination before it may constitutionally implement an affirmative action plan.[329] It would seem an empty offer to include the majority employees in a fairness hearing but deny them the opportunity to make their strongest claim against the consent decree: that the employer's evidentiary findings of discrimination are constitutionally insufficient. Where majority employees assert equal protection claims within the Title VII negotiation it may be difficult to reach settlement absent specific evidence of unlawful discrimination.

The problem arises from the conflict between the constitutional requirement of particularized findings of prior discrimination, and the potential destruction of the consent decree if majority employees are allowed to fully litigate the sufficiency of these findings. The Title VII settlement is useful because the parties may agree on a plan without fully proving past discrimination by the employer.[330] This utility would be undermined if equal protection claims required a specific finding of past discrimination by a competent body before public employers could implement a valid affirmative action

---

[322] *See id.*
[323] *See id.* at 3080.
[324] *See id.*
[325] Schwarzschild, *supra* note 5, at 930, 932.
[326] *Id.* at 923.
[327] *Id.*
[328] *Id.* at 935.
[329] *See supra* notes 175–232 and accompanying text.
[330] *See Local Number 93*, 106 S. Ct. at 3079.

plan. In these circumstances few public employers would take the trouble to settle Title VII claims if their prior liability had to be publicly litigated regardless of the settlement.

Professor Schwarzschild's proposal requires that courts keep the focus of the fairness hearing on the propriety of the proposed remedy.[331] He believes the procedure will not function if challengers are permitted to question at length the issues of past liability.[332] In the absence of a constitutional dimension in the case, this approach would work well. As Professor Schwarzschild points out, only an attenuated relationship exists between the prior violation and the future remedy in the typical Title VII consent decree.[333] Because the Supreme Court has not addressed the relationship between Title VII and the equal protection clause, however, it is not clear whether the fairness hearing procedures satisfy the constitutional requirements.[334]

Whether majority employees are permitted to challenge the issue of the public employer's past discrimination depends upon the interpretation of the equal protection clause. If the courts interpret the Constitution to require extensive, contemporaneous, and conclusive findings of discrimination to support affirmative action, then majority employees working for public employers must be allowed to litigate the issue of prior discrimination, and courts must sacrifice the goal of voluntary settlement before the constitutional mandate. But if courts interpret the constitutional requirement of findings of prior discrimination less stringently, courts may reconcile Title VII and the Constitution and thereby preserve the consent decree for public employers.

Justice O'Connor noted the anomalous result of the more restrictive interpretation of the equal protection clause in her *Wygant* concurrence.[335] She observed that this interpretation would forbid public employers from correcting the unlawful discrimination that private employers could remedy voluntarily.[336] In order to avoid this unsatisfactory result Justice O'Connor outlined an interpretation of the equal protection clause that would resolve the conflict between voluntary racial remedies and the findings requirement of the Constitution.

For equal protection challenges to voluntary affirmative action, Justice O'Connor proposed the application of a test similar to that proposed in the Title VII *Weber* case.[337] Justice O'Connor would find that evidence sufficient to support a prima facie disparate impact claim under Title VII would also provide the firm basis required to conclude that there is a compelling remedial purpose under the equal protection clause.[338] Just as under Title VII, Justice O'Connor explained, this conclusion would give rise to a rebuttable inference that the plan is appropriate to remedy apparent prior discrimination.[339] Majority employees would then "be given the opportunity to prove that the plan does not meet the constitutional standard."[340] As challengers, the Justice concluded, the majority employees would have to convince the court that the evidence does not support

---

[331] Schwarzschild, *supra* note 5, 923.

[332] *Id.*

[333] *Id.*

[334] *See supra* notes 314–24 and accompanying text.

[335] *Wygant*, 106 S. Ct. at 1854–55 (O'Connor, J., concurring).

[336] *Id.* (O'Connor, J., concurring).

[337] *Id.* (O'Connor, J., concurring). See *supra* notes 85–89 and accompanying text describing the *Weber* Title VII requirements.

[338] *See Wygant*, 106 S. Ct. at 1854–55 (O'Connor, J., concurring).

[339] *Id.* (O'Connor, J., concurring).

[340] *Id.* (O'Connor, J., concurring).

the inference of discrimination, or that "the plan instituted on the basis of this evidence was not sufficiently narrowly tailored" to redress the prior discrimination.[341]

Justice O'Connor proposed this constitutional analysis in *Wygant* in response to an affirmative action plan negotiated in the collective bargaining agreement between the school board and the teachers. She sought to articulate a standard which would preserve voluntary affirmative action by not requiring the employer to prove prior guilt and liability. Justice O'Connor appears to suggest that challengers to the affirmative action plan embodied in such nonjudicial settlements should have full and traditional access to the courts, just as the teachers did in *Wygant*.[342] Under the less stringent equal protection analysis she proposed, the employers defending reverse discrimination claims could rely on non-individualized statistical evidence to sustain their affirmative action plans.

Although *Wygant* did not involve a judicially approved consent decree, Justice O'Connor's approach can be modified for use in consent decree proceedings. Justice O'Connor's proposal provides an excellent vehicle for reconciling the equal protection constitutional requirements with the operation of the fairness hearing procedure proposed by Professor Schwarzschild. If courts accept a constitutional evidentiary standard similar to that outlined by Justice O'Connor, the fairness hearing could accommodate the equal protection requirements which govern public sector affirmative action.

The Justice's reasoning could be applied to the consent decree fairness hearing process in the following manner. During the hearings, the nonminority intervenors would have the opportunity to object not only to the particulars of the remedy, but also to the sufficiency of the evidence presented to justify the racial preferences, the competence of the employer to determine the past discrimination, and the reach and operation of the decree. The intervenors would have the right to present evidence that would tend to rebut the evidence of the minority plaintiffs and the employer. The intervenors would not have the right to raise and formally litigate reverse discrimination claims, however, any more than they could litigate and defend the original discrimination claims against the employer under Professor Schwarzschild's proposal. The court would hear evidence and arguments in a less formal manner than traditional litigation, and would not make findings of fact or conclusions of law. Instead, the court should consider the intervenor's evidence that the remedy is unconstitutional as part of the balance of the equities in examining the decree.

In examining a proposed consent decree, courts should follow the analysis of *Vanguards* and *Bratton* and consider whether the plan is "reasonably related to the objective of remedying prior discrimination," and whether the plan is "fair and reasonable to nonminorities affected by it."[343] Specifically, in making the determination whether to approve the decree, courts should apply standards similar to those first enunciated in *Weber*.[344] This approach comports with the general reasoning of Justice O'Connor's

---

[341] *Id.* (O'Connor, J., concurring). Justice O'Connor noted:

> The institution of such a challenge does not automatically impose upon the public employer the burden of convincing the court of its liability for prior unlawful discrimination; nor does it mean that the court must make an actual finding of prior discrimination based on the employer's proof before the employer's affirmative action plan will be upheld.

Id. (O'Connor, J., concurring).

[342] *Id.* (O'Connor, J., concurring).

[343] *Vanguards*, 753 F.2d at 484 (citing *Bratton*, 704 F.2d at 887).

[344] *Weber*, 443 U.S. at 208.

Wygant concurrence.[345] The *Vanguard* court formulated these standards as follows: first, a consent decree may not contain an affirmative action plan unless the employer has employed minorities in a lesser proportion than the relevant labor market; second, the plan cannot require the firing and replacement of nonminority workers with minority workers; third, the plan cannot "create an absolute bar to the advancement of nonminority employees;" and finally, the decree must be temporary and must terminate "when the underutilization of minorities has been corrected."[346] Intervenors could argue that the consent decree violates one of these standards. If the district court approves the decree, the intervenors may appeal, and the appellate court would review the decision using an abuse of discretion standard.[347]

In this process the court should play a active role in regard to the constitutional claims similar to that suggested by Professor Schwarzschild for Title VII objections.[348] If, after hearing from all the parties, the court finds that the consent decree is fair and reasonable, the court should enter the decree. Upon approving a consent decree the court should address the constitutional objections and state why the majority employees did not convince the court of their case against the decree.

It is possible, therefore, to resolve the issues raised by majority employees in Title VII consent decree proceedings. Courts should no longer resort to the procedural device of precluding majority employees with a strict timeliness requirement and the dismissal of subsequent suits. Instead, courts should permit intervenors to object to the terms of the consent decree, and to suggest less onerous alternatives. In the public sector, courts also should permit intervenors to challenge the constitutionality of the affirmative action remedy, including the opportunity to introduce evidence that would tend to rebut the findings of prior discrimination by the employer.[349] For this process to function, courts should interpret the equal protection clause not to require a significantly more demanding evidentiary standard than that provided by a prima facie Title VII pattern or practice claim.[350]

Conclusion

Title VII consent decrees offer an important vehicle for employers to voluntarily eliminate their part in "traditional patterns of racial segregation and hierarchy"[351] by making significant institutional changes in their personnel policies. Because consent decrees operate on a broad structural level, however, their use has embroiled the courts in the problems of the right of third parties to intervene, and the manner in which to accommodate their objections. The problem is especially acute when the consent decree involves a public employer because the challenging party may raise the separate requirements of the equal protection clause. The Supreme Court has provided little guidance in the resolution of these questions.

A fairness hearing procedure with limited intervention rights for third parties can offer a forum to majority employees without sacrificing the advantages of a negotiated

---

[345] *Wygant*, 106 S. Ct. at 1852–57.
[346] *Vanguards*, 753 F.2d at 484.
[347] *Id.*
[348] *See supra* notes 310–318 and accompanying text.
[349] *See Local Number 93*, 106 S. Ct. at 3079–80.
[350] *See, e.g., Vanguards*, 753 F.2d at 484.
[351] *Weber*, 443 U.S. at 204.

settlement to the principal parties. Courts should follow this procedure because the alternative is to restrict the use of voluntary affirmative action, and thereby slow the process of integration at all levels of the workplace. Courts should not back away from the promise of federal antidiscrimination laws to open opportunities to minorities long closed by "an unfortunate and ignominious page in this country's history."[352]

WILLIAM T. MATLACK

---

[352] Albermarle Paper v. Moody, 422 U.S. 405, 418 (1975).